Supreme Court, U. S.
FILED
MAY 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73 - 1767

JAMES BURCHETT,

Petitioner,

v.

HAROLD J. CARDWELL, Warden,
Arizona State Penitentiary,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James Burchett petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of his habeas corpus petition by the United States District Court for the District of Arizona.

## OPINIONS BELOW

The district court entered unreported findings of fact, conclusions of law, and a judgment on July 21, 1972. They are attached hereto as Appendix A.

The opinion of the court of appeals was entered on February 25, 1974, and has not yet been reported. It is attached

hereto as Appendix B. There have also been prior decisions by the Supreme Court of Arizona issuing a writ of prohibition to block Burchett's original state court habeas corpus petition and affirming his convictions in a delayed appeal. They have been reported at 105 Ariz. 372, 464 P.2d 964 (1970), and 107 Ariz. 185, 484 P.2d 181 (1971), and are attached hereto as Appendices C and D, respectively.

## JURISDICTION

The district court had jurisdiction of Burchett's petition pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Did the standard for assistance of counsel applied by the courts below conflict with the "effective assistance of counsel" standard required both by this Court and by other circuit courts to satisfy Burchett's constitutionally guaranteed right to counsel?

2. Did findings by the courts below that Burchett's guilty pleas were voluntarily entered, in the absence of any evidence to support such findings, conflict with this Court's holding in *Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962), that such waivers cannot be presumed but must be supported by a record showing that the accused understandingly and knowingly waived his constitutional rights?

3. Did the Supreme Court of Arizona's decision affirming Burchett's conviction deny him due process and equal protection of the law where (1) only three justices heard

oral argument, (2) all five signed the opinion, (3) the opinion overruled two of that court's prior decisions supporting Burchett's contention that consecutive life sentences could be not validly imposed upon him, (4) whether those cases should be overruled was not argued either in the briefs or at oral argument, and (5) Burchett's motion for rehearing *in banc* to consider this issue was denied without hearing or opinion?

## CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. amend. V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

3. U.S. Const. amend. XIV:

> " . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

A. *Proceedings in the Courts Below.*

Burchett's habeas corpus petition sought to set aside convictions and sentences following guilty pleas entered in 1961 to charges of assault with intent to commit rape, kidnapping, and statutory rape. Following those guilty pleas, he was sentenced to life imprisonment without possibility of parole for kidnapping and to a consecutive term of 20 years to life for

statutory rape (R. 42).* In addition, a prior probation for the unrelated assault conviction was revoked and he received another consecutive sentence of 10-14 years. Burchett's state remedies were exhausted prior to filing the district court petition.**

The petition alleged that Burchett's guilty pleas were involuntary because they were based on involuntary confessions; lack of effective assistance of counsel; physical and psychological pressures imposed by confinement, police, prosecution, family, and counsel; and inflamatory news coverage. It also alleged that he was unfit by reason of his age, experience, and mental condition to enter a knowing guilty plea; and that he pleaded guilty to avoid risking a jury-imposed death penalty that could not be imposed following a guilty plea and sentence by the court (R. 3). It further alleged that his sentences to two consecutive life terms followed by another consecutive sentence for a term of years, rather than to

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*"R." references are to the Clerk's record on appeal. "T." references are to the reporter's transcript of proceedings at the district court evidentiary hearing held on May 18-19, 1972.

**In 1969, Burchett filed a state court habeas corpus petition alleging the same challenges to the validity of his convictions as those later alleged in the district court (R. 76-104). The Supreme Court of Arizona thereafter issued a writ of prohibition preventing any further action on the habeas corpus petition. *State ex rel. Eyman v. Superior Court*, 105 Ariz. 372, 464 P.2d 964 (1970). Thereafter, however, it allowed him to take a delayed appeal. The state habeas corpus record was also reviewed and considered in that proceeding (R. 118). It then affirmed his convictions. *State v. Burchett*, 107 Ariz. 185, 484 P.2d 181 (1971), and denied his motion for rehearing without opinion (R. 138). All of the matters presented in the federal habeas corpus petition concerning the involuntariness of Burchett's guilty pleas and the propriety of his sentences were presented both to the Pinal County Superior Court and the Supreme Court of Arizona. The matters raised for the first time by the latter's opinion were presented in the motion for rehearing.

concurrent and indeterminate sentences, violated his rights under the fifth and fourteenth amendments and that the procedures followed by the Supreme Court of Arizona in determining his appeal and overruling its prior decisions supporting his position also denied him those rights (R. 3-4).

The district court first directed that memoranda be submitted concerning exhaustion of state remedies (R. 70). It then held an evidentiary hearing on May 18-19, 1972, as to the circumstances leading to the guilty pleas and thereafter entered unreported findings of fact, conclusions of law, and a judgment denying the petition. It concluded that (1) the claims concerning actions by the Supreme Court of Arizona did not state a violation of federal rights; (2) Burchett's decision to enter guilty pleas was voluntary; (3) there was no taint of any other federally impermissible proceeding to poison the guilty pleas; and (4) the guilty pleas were "influenced" but "not legally coerced" by Burchett's trial counsel and father, were "primarily motivated by a realistic fear of the death penalty," and were thus constitutionally permissible (R. 183-92; Appendix A hereto). Although it denied the petition, it issued a certificate of probable cause to appeal (R. 209).

Burchett appealed the district court's ruling to the court of appeals. Its opinion, entered on February 25, 1974, affirmed the district court's findings that his guilty pleas were voluntary and that he had the effective assistance of counsel, that this representation by counsel precluded any challenge to the guilty pleas based upon the claim that it was coerced by a fear of the death penalty, that his sentences were proper and that the Supreme Court of Arizona had not denied him due process of law in the state court appeal (Appendix B hereto). This petition follows.

B. *Facts Developed at the Evidentiary Hearing.*

At the time of his arrest in September, 1961, Burchett was 20 years of age, a high school graduate, and did not know anything about the law (T. 171). He had had a long history of mental and sexual disturbances reflected in incidents of exhibitionism and other abnormal conduct (T. 73-76, 138-41). He had also been previously committed to the Arizona State Hospital and Camelback Hospital in Phoenix and had been treated in a California sanitarium for several months (T. 73-74, 121-22). Shortly before the events leading to his arrest in September, 1961, Burchett felt his condition was getting worse and asked his family doctor to castrate him because he could not control his feelings. The doctor, however, was unwilling to do so without first convening a medical board (T. 145-46).

Petitioner had been treated regularly during 1958-59 by Dr. Maier Tuchler, a Phoenix psychiatrist. Dr. Tuchler had thereafter remained in contact with him at the Prison and had discussed the circumstances involved in detail (T. 12-14). Dr. Tuchler testified without contradiction that as of the date of Burchett's arrest, his personality was very passive, he could not consciously control his sexual impulses, and he had no substantial capacity to control what he was doing (T. 17-18). His opinion was that although Burchett knew at the time of the crime involved what he was doing, he could not judge whether it was right or wrong (T. 20). Burchett also testified without contradiction that he was not in control of his faculties and did not know right or wrong during the events that allegedly occurred (T. 148-49).

Burchett was arrested after he had returned the victim to her home and simply waited there for the police to arrive

(T. 149). He was given no advice or warnings as to his constitutional rights either when he was arrested or prior to his interrogation at the City Jail (T. 151-52). He was asked only if he wanted to telephone his own attorney (T. 211-12). He had no attorney at that time.

As the result of interrogations by police officers and a deputy county attorney, Burchett gave oral and written confessions to the kidnap-rape charge and also admitted having done many of the things described in a 10-inch high stack of unsolved reports about which he was interrogated. His reason for these admissions was that he thought he was thereby helping his interrogators and that in turn they had told him they would help him get treatment (T. 154, 158-59). He gave the confessions and waived a preliminary hearing without any advice by counsel. He was not advised by anyone concerning his right to counsel until his arraignment in Superior Court (T. 162). Burchett's parents were unable to retain counsel because they had already spent all their funds on his psychiatric treatment (T. 79).

Burchett was provided with appointed counsel, A. E. Later, at the Superior Court arraignment. He saw Later briefly only once thereafter (T. 164). Later never discussed the facts of the crime with Burchett, whether he had actually committed it, his state of mind at the time, the circumstances of the prior confessions, or how Later intended to defend the case (T. 165). Later never told Burchett he was aware of his confessions (although he told his parents he had seen them) and did not discuss with anyone whether they might be suppressed or the circumstances under which they were obtained (T. 88). Later filed an application for Burchett's commitment to the State Hospital for observation and examination, but withdrew

the application prior to hearing because he was told the Hospital would not hold Burchett more than 30 days (T. 88). He did not have Burchett examined by Dr. Tuchler or any other psychiatrist to determine whether he was criminally responsible for the alleged acts or able to assist counsel in his defense.

Throughout his confinement, Burchett saw Later only on one occasion for no more than 10 to 15 minutes (T. 185). He was able to see his father for only 3 or 4 mintues at a time (T. 169). There had been frequent news reports and television and radio broadcasts concerning him (T. 115, 265; R. 34-39). The community attitude in Phoenix at that time was "profoundly retaliatory" towards persons charged with sex crimes (T. 24-25). Yet, Later never discussed or filed a motion to postpone the trial date, for a change of venue, and never attempted to discuss a plea bargain with the County Attorney's Office or to review its file, although it was available to him (T. 64-66, 116).

The decision to have Burchett enter guilty pleas was made in a meeting among Later, Burchett's father, and Larry Vawter, the probation officer previously assigned to him (T. 88-89). Burchett himself was not present. Later stated at that time that since there was a signed confession he could not protect Burchett from the death penalty. Those present agreed that he should plead guilty because of the strong possibility he might be given the death penalty by a jury (T. 93). Later advised Burchett's father that if he were to plead guilty and be sentenced by the court, the death penalty could not be imposed. *Id.*

Burchett's father then went to the jail and simply told him that the decision had been made for him to plead guilty (T. 94). Later was not present at that time to advise him as to

the consequences of the plea (T. 93). Burchett testified at the district court hearing that he just "kind of accepted" the decision because he knew he could not make it for himself (T. 170). This testimony was confirmed by Dr. Tuchler's uncontroverted opinion that at this time Burchett had no volition in deciding to plead guilty (T. 51-52), that he did not have the ability to make judgments for himself or to refuse to accept anything suggested to him by an authority figure, and that he was "really without volitional control" at that time (T. 48).

There was absolutely no record made at the superior court change of plea hearing on November 15, 1961, as to whether the guilty pleas were voluntarily entered. There was no court reporter present. The judge who accepted the plea testified at the district court hearing that he had no recollection of Burchett appearing before him and no recollection of whether any inquiry was made whether the plea was voluntarily entered (T. 240-41). Burchett's testimony was uncontradicted that no one ever asked him whether his guilty pleas were voluntarily given. He did not believe that he was in fact guilty of the offense or responsible for what he had done (T. 174-80). The decision was made only to avoid the death penalty (T. 180).

The sentencing judge also did not recall any inquiry as to whether any promises had been made to Burchett or whether his guilty pleas were voluntarily given (T. 51, 255). There was also no court reporter at the sentencing hearing and no other record of any such inquiry.

## REASONS FOR GRANTING THE WRIT

I. *The Standard for Assistance of Counsel Applied by the Courts Below Conflicts with the "Effective Assistance of Counsel" Standard Required both by this Court and by Other Circuit Courts to Satisfy Burchett's Constitutionally Guaranteed Right to Counsel.*

Despite the total failure of inquiry by Burchett's trial counsel concerning the background of his confessions and his mental condition, the court of appeals affirmed the district court findings that his guilty pleas were voluntary and that he had the effective assistance of counsel. It declined to discuss the facts upon which it relied to support those conclusions (Opinion, p. 2). Based on the undisputed district court record, however, those findings are inconsistent with the applicable standards for the effective assistance of counsel required both by this Court and by other courts of appeals. This conflict in standards among the circuits and with this Court's decisions presents an important question generally affecting the administration of criminal justice that the Court should now definitively resolve.

In *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), the Court held that whether a guilty plea is unintelligent and therefore vulnerable depends not upon whether counsel's advice was right or wrong but on whether that advice was within the range of competence demanded of attorneys in criminal cases. As the Court there stated, "defendants facing felony charges are entitled to the effective assistance of competent counsel . . . if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . Judges should strive to maintain proper standards of performance by attorneys who are representing

defendants in criminal cases in their courts."*

The Ninth Circuit appears previously to have taken the position that counsel's errors cannot vitiate prior proceedings unless the performance was such as to amount to no representation at all or to reduce the trial to a "farce" or a "mockery of justice."** This lower standard conflicts directly with the "effective assistance of competent counsel" required by this Court's decision in *McMann v. Richardson, supra*, as well as decisions to similar effect in other circuits.

The Sixth Circuit has recently held in *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), that a defendant was denied the effective assistance of counsel before and during trial because potentially exonerating defenses were not explored by counsel and were not developed at trial. It there held that under the sixth amendment, the standard of assistance of counsel required was "counsel reaonsably likely to render and rendering reasonably effective assistance." Other decisions to this effect include *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967), and *Scott v. United States*, 427

*This statement followed the line of cases requiring effective assistance of counsel beginning in *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), (conviction reversed where appearance of counsel was *pro forma* rather than zealous and active) and continuing with such decisions as *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940), (the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment); *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); *White v. Ragen*, 324 U.S. 760, 65 S. Ct. 978, 89 L. Ed. 1348 (1945), and *Reece v. Georgia*, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955). *See generally*, Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-conviction Relief in Criminal Cases*, 59 *N.W.U. L. Rev.* 289 (1964).

**E.g., *United States v. Valerzuela-Mendoza*, 452 F.2d 773, 774 (9th Cir. 1972); *Murgia v. United States*, 448 F.2d 1275 (9th Cir. 1971); *Kruchten v. Eyman*, 406 F.2d 304 (9th Cir. 1969); and *Lyons v. United States*, 325 F.2d 370, 377 (9th Cir. 1963).

F.2d 609 (D.C. Cir. 1970), both of which rejected the earlier "farce and mockery" standard. *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973), has also applied the "reasonably effective assistance" standard to appointed as well as to retained counsel, rather than the "farce and mockery" standard.

We recognize that under *McMann v. Richardson*, Burchett is not entitled to go behind his guilty pleas to establish their involuntariness unless he has first established that he had been inadequately represented by counsel. In view, however, of Later's obvious failures to explore the background of his confessions and his mental condition and his failure even to be present when Burchett's father told him that the decision had been made for him to plead guilty, the court of appeals should have held that his representation did not meet the required constitutional standards. It then should have determined that on the basis of the undisputed district court record there was a lack of any testimony to support the district court's conclusions that the guilty pleas were voluntarily entered.

II. *The Findings By the Courts Below That Burchett's Guilty Pleas Were Voluntarily Entered, in the Absence of Any Evidence To Support Such Findings, Conflict with This Court's Holding in Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962), That Such Waivers Cannot Be Presumed But Must Be Supported by a Record Showing that the Accused Understandingly and Knowingly Waived His Constitutional Rights.*

The court of appeals also sustained the district court's conclusion that Burchett's guilty pleas were voluntarily entered without stating the facts upon which it relied in reaching that result. The record before the district court, however, was completely silent as to whether there had been any inquiry as to the voluntariness of those pleas or any statement that

they were voluntarily given. The undisputed testimony instead clearly showed that the pleas were the result of a fear of the death penalty shared by Burchett, his father, and Later, the existence of prior involuntarily given confessions without any break in the chain of circumstances, and the lack of effective assistance of counsel.

Neither of the superior court Judges before whom Burchett appeared recalled making any inquiry of him as to whether his guilty plea was voluntary. No court reporter was present at either the change of plea or sentencing hearing. There was no testimony by anyone at the hearing that Burchett's guilty pleas were voluntarily entered. There was, on the other hand, ample evidence that the decision to plead guilty was made by Burchett's father, Later, and the probation officer as the result of their fear that the death penalty could be imposed by a jury if the case were tried while it could not be imposed if Burchett pleaded guilty and was sentenced by the court* and as the result of Later's failure to develop background information concerning the circumstances of the confessions previously given by Burchett, his psychiatric history, and his state of mind at the time of the alleged crime. Later did not even discuss the decision to plead guilty with Burchett personally —that was left to his father, despite his own heavy emotional involvement in the situation. Burchett testified without contradiction that he was not capable at the time of making the decision to plead guilty for himself and could only rely on his father's judgment (T. 170). This testimony was independently confirmed by Dr. Tuchler's uncontradicted expert opinion (T. 48, 51-52).

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*The situation in this respect was nearly identical to the one presented in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Under all these circumstances, the record totally failed to support the conclusion by the courts below that Burchett's guilty pleas were knowingly, intelligently, and voluntarily entered. Waivers of his constitutional rights had to be presumed from a silent record to reach that conclusion. It therefore squarely conflicts with *Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962), which requires that the record or evidence show that the accused intelligently and understandingly wavied his constitutional rights. "Anything less is not waiver." 369 U.S. at 516.*

III. *The Circumstances Under Which the Supreme Court of Arizona Affirmed Burchett's Convictions Denied His Rights to Due Process and Equal Protection of the Law.*

Only three justices of the Supreme Court of Arizona heard the oral argument of Burchett's delayed appeal. All five, however, signed the opinion. The opinion overruled two of that court's prior decisions supporting Burchett's contention that consecutive life sentences could not validly be imposed upon him. It was stipulated in the district court record that whether those cases should have been overruled was not argued either in the briefs on appeal or at oral argument and that

*The court of appeals had recently held in *Hart v. Eyman*, 458 F.2d 334, 338 (9th Cir. 1972), a case concerning the voluntariness of confessions, that the burden of producing the necessary record to enable a federal court to decide the case is clearly on the State. The court of appeals decision sustaining the voluntariness of Burchett's guilty pleas on the basis of the record presented also directly conflicted with the burden of proof required in *Hart*. Other decisions requiring a knowing, deliberate, and intentional waiver of defendant's rights before that waiver is valid, with which the present decision also conflicts, include *United States v. Lavelle*, 306 F.2d 216, 218 (2d Cir. 1962); *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969); *United States v. Allison*, 387 F.2d 949 (7th Cir. 1967); *United States v. Anderson*, 394 F.2d 743 (2d Cir. 1968); and *Dulin v. Henderson*, 448 F.2d 1238 (5th Cir. 1971).

Burchett's motion for rehearing *in banc* to consider these questions was denied without opinion and without a hearing.

The court of appeals rejected Burchett's contention that the Arizona Supreme Court thereby denied him due process and equal protection of law by simply citing its decision in *Dredge Corp. v. Penny*, 338 F.2d 456 (9th Cir. 1964), which holds that the opportunity to be heard orally on questions of law is not an inherent element of procedural due process. That decision, however, is wide of the mark in the present case.

The court of appeals decision conflicts in principle with this Court's decisions in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), and *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), both of which hold that the due process and equal protection clauses protect convicted defendants from invidious discriminations on appeal. Although a state may have no responsibility as an original matter to provide oral argument on appeal, once it has undertaken to do so before those judges who will actually decide the case, it cannot arbitrarily deny a party the right to be heard by all of those participating in the decision. Particularly where the court is contemplating overruling two of its prior decisions and that possibility has never before been briefed or argued, the matter should be fully heard. The Arizona Supreme Court's actions thus denied Burchett an opportunity to be heard at a meaningful time in a meaningful manner in violation of his rights established in such cases as *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1364 (1914); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692 (1944); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 1113 (1971); and

*Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).

## CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,
LEWIS AND ROCA

By Paul G. Ulrich
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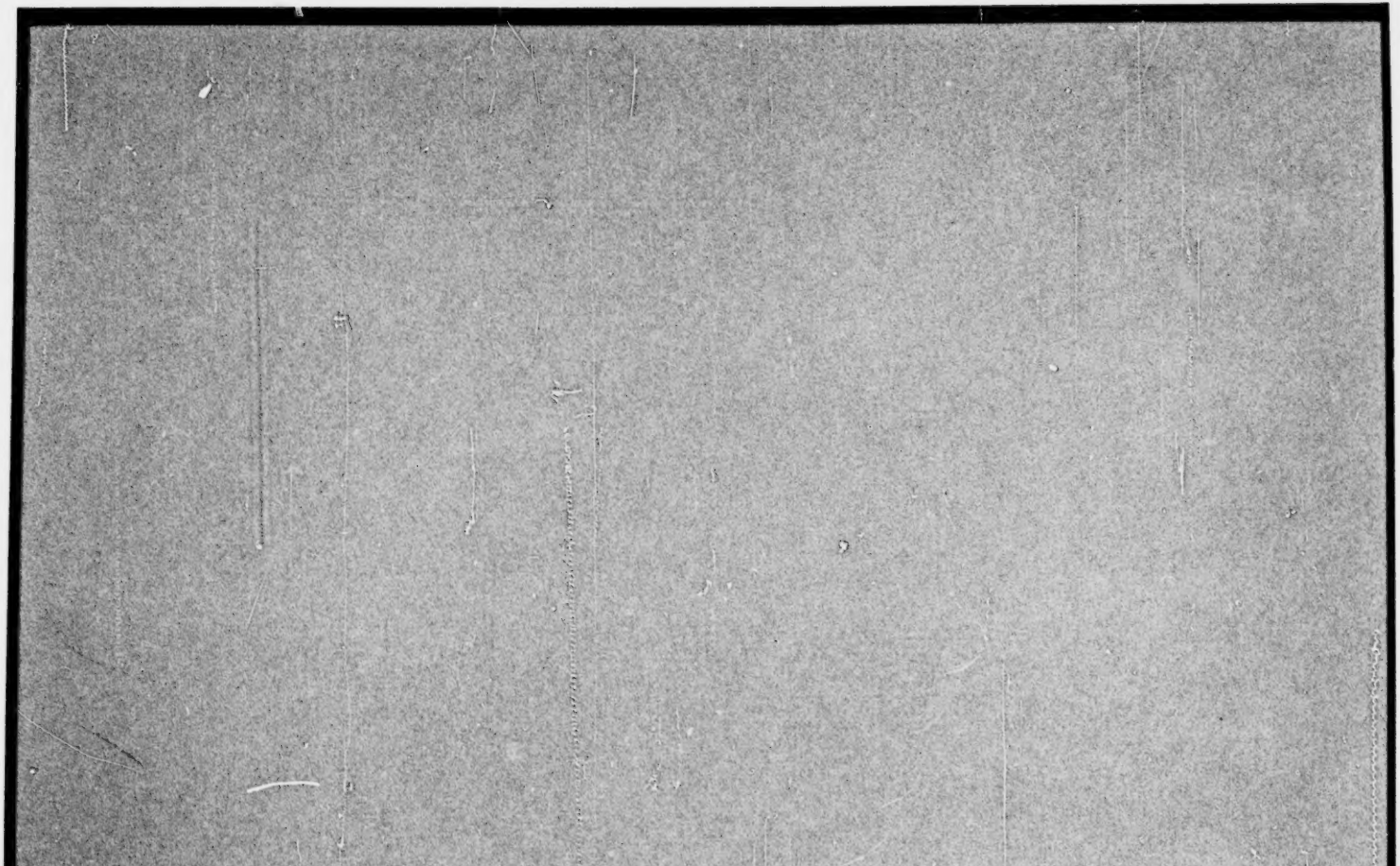
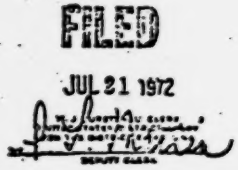
May, 1974.



APPENDIX A




IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| JAMES BURCHETT, Petitioner, vs. FRANK EYMAN, Warden Arizona State Prison, Respondent. | No. CIV 71-401 PHX - CAM<br>FINDINGS OF FACT and CONCLUSIONS OF LAW |

The petition for habeas corpus attacks judgments and convictions in two criminal cases. Insofar as the petitioner complains of the actions of the Supreme Court of Arizona in its interpretation of Arizona law (see ¶ 5(d) of petition) these allegations do not state a violation of a federal right.

Petitioner's basic federal claim is that his custody is the result of a guilty plea made on March 15, 1961 (petitioner's Exhibit 5), which fell below federal standards of voluntariness. His further allegations of federal violations are pertinent only insofar as they relate to his attack on his plea, i.e., whether there was such undue publicity, coerced confession, ineffective assistance of counsel, physical and psychological pressure as to affect

the voluntariness or otherwise taint his guilty plea.

Petitioner's formal allegations all attack his conviction on constitutional bases. Petitioner's present counsel indicated to the Court however, that there were other issues concerned here, perhaps merely human rather than strictly legal issues, in that "one of the principal purposes" of this proceeding was to release petitioner from prison in order to permit him to receive treatment as a "civilian mental patient." TR 6, L.18 - TR 7, L.13.

The issues of petitioner's present illness (if any), need for treatment (if any), and inability to receive treatment as a prisoner (if this is the fact) is not properly before this Court in this proceeding, and these matters cannot be considered in evaluating the present claims of illegal conviction.

It is a sad commentary, however, that a prisoner represented by distinguished counsel would feel compelled to take this oblique route of constitutional attack on a conviction in order to obtain treatment which the prisoner and his attorney sincerely feel is needed. Certainly a state having custody of a man's body has a duty to treat a treatable illness, whether that illness be physical or mental.

At the evidentiary hearing, Dr. Maier Tuchler, a psychiatrist, presented a picture of petitioner's personality as "the basic pattern of all sexual offenders" (TR 17 L.9-10) ie., a passive person who plead guilty in response to the advice of parents, attorney, and other authority figures; as well as in response to fear of the death penalty. TR 29, L.15-21.

Although petitioner would have the ability to discuss the facts of his crime with his attorney (TR 41, L.4-6) and he could intellectually judge the factors to be evaluated in deciding to plead guilty, his passive dependency caused him to be "overwhelmed" by the advice of others to such a point that he was not able to make a mature judgment for his age. TR 37, L.22 - TR 38 L.14. The pressures upon petitioner, including the advice of others and fear of the death penalty were so great, Dr. Tuchler stated that he doubted very much "if he had volition in the plea." TR 52, L.4-7.

Dr. Tuchler's doubts as to petitioner's volition in the face of psychological pressures leading to the guilty plea loses considerable weight when examined in light of the doctor's means of knowledge. The plea was entered November 15, 1961. Dr. Tuchler had last seen petitioner more than two years before the plea (TR 12, L.17-21) and did not see him after the plea until February, 1963, and then once a year till 1971. TR 14, L.5-10. The doctor himself spoke of the difficulty in telling what petitioner's state of mind was in 1961 when he had not seen petitioner since 1959. TR 46, L.10-16. Further, the doctor took no interest in the circumstances surrounding the guilty plea until 1965, 1966, and 1967. TR 47, L.12-16. The weight of the doctor's expert opinion as to petitioner's state of mind at the time of plea is further weakened by the doctor's testimony that petitioner was not in this state of mind in 1959 (TR 48, L.3-15), the only period of time in which the doctor regularly treated petitioner. TR 10-14.

Dr. Tuchler assumes that the events leading to the guilty plea as they were related to the doctor would have caused the passive, suggestive, non-violitional changes which he describes. TR 49-50.

Thomas Bradley, a police officer, interviewed petitioner on September 30, 1961, the date of the crime. TR 197, L.6. Officer Bradley states that petitioner was asked if he wished to call a lawyer or his parents, and that petitioner refused. TR 211, L.5-23. The officer did not coerce or threaten or offer any promise to petitioner (TR 212, L.10-12); nonetheless, petitioner voluntarily stated a detailed account of the crime, as appears in TR 201-202. Officer Bradley's testimony, based on his notes made following the interview, appears to this Court more credible insofar as this testimony relates to the voluntariness of petitioner's confession than petitioner's story to the effect that the officer supplied him with information as to some of the details of the crime. TR 156, L.24 - TR 157, L.13. Officer Bradley's testimony, insofar as it combines with petitioner's own account of the crime (TR 147-148) shows strong evidence of guilt. Most of the other court and law enforcement officers who testified had little independent recollection of the pertinent events.

The prosecutor, Frank Gabusi, also had little independent recollection, except that he did remember telling defense counsel that he would qualify the jury for the death penalty. TR 68, L.24 to TR 69, L.2.

Lonnie Burchett, petitioner's father, told of a

number of discussions of the case with petitioner, and of other discussions with petitioner's attorney prior to the plea. TR 86-95. Mr. Later, petitioner's court-appointed attorney (who died a number of years ago) told the father (according to the father) that in a jury trial, he could not protect petitioner from getting the death penalty and that if petitioner were sentenced by a judge on a guilty plea, "it would be a chance that it would be a life sentence without possible parole." TR 90, L.9-10. Mr. Later gave this advice after he had discussed the issues of insanity and incompetence to stand trial with the then superintendent of the State Hospital (TR 86, L.16-21 and TR 117, L.17- TR118, L.8) and probably another psychiatrist or two (TR 87, L.12); and after the superintendent had told Mr. Later that petitioner could aid in his own defense, and that he knew right from wrong, and that there were no treatment facilities available for petitioner (TR 117, L.17- TR 118, L.8), the father testified that he and a probation officer and Mr. Later made the decision to plead petitioner guilty to avoid the death penalty. TR 92, L.14 to TR 93, L.3. Although the father stated that petitioner accepted this decision, his account of his conversation with his son concerning the guilty plea does not indicate a volitionless acceptance of advice, but rather that the petitioner asked his father what factors entered into the decision, and the father gave the petitioner a detailed account of the advantages of a guilty plea (TR 94, L.1- TR 95, L.12) including the fact that he could not take a chance with a jury, and that in ten years, there might be

mental hospital treatment available for him. TR 95, L.6-7. The latter hope did in fact materialize. (See respondent's Exhibit D, a record of petitioner's treatment in the state mental hospital in 1971).

It is hard to reconcile the doctor's picture of petitioner as a man so passive and suggestible as to raise doubts about his volition in 1961 with petitioner's intelligent, self-possessed demeanor as a witness at the hearing.

Perhaps the most convincing evidence relating to the reasons for the guilty plea is given by petitioner, himself. Petitioner clearly states that he plead guilty to avoid the death penalty and to have a place to go. See TR 171, L.18-25 and TR 179, L.20 - TR 180, L.11 as follows:

> "As you sit here now, looking back into 1961, at the time that you decided to make a guilty plea to the kidnap-rape charges, do you believe that your decision at that time was voluntary?
>
> A. No.
>
> Q. Why not?
>
> A. Because as I looked back now, it was a decision that had to be made.
>
> There was no place for me. The State Hospital didn't want me. And the only other place that they could put me was the State Prison.
>
> And to avoid the death penalty, and to have somewhere for me to go, it was actually the only place they could send me. And that is where I went.

It would just seem like it was that simple, it was like a contract, you know, they just ran me through the proceeding, and I went."

This Court finds that Dr. Tuchler's testimony as to petitioner's passive and suggestible personality at the time of the guilty plea is credible, but that the doctor's further doubts as to petitioner's volition must fall before the more credible accounts of petitioner and his father relating to the actual events and conversations concerning the guilty plea. The guilty plea was not made with an unknowing, blind reliance on advice of father and counsel, but rather after questioning as to the reasons for the advice, and with a full understanding of the circumstances leading to that advice. The circumstances at the time of the plea show that there was strong evidence of guilt, that the petitioner's attorney had investigated a defense of insanity, and reasonably concluded that this would be futile; that that there was no other defense that would give petitioner a real chance of avoiding a guilty verdict at trial. The attorney realistically concluded that petitioner was in real danger of a death sentence if he stood trial, and that his best chance of avoiding death was by pleading guilty. Petitioner was well aware that this was his situation when his father advised a guilty plea and petitioner replied, "Dad, I don't know what else we can do." TR 94, L.11-12.

The guilty plea was involuntary only in the sense that under the circumstances created by petitioner's own criminal acts and the admissible strong evidence of such acts,

it was the only realistic choice open to him.

CONCLUSIONS OF LAW

The evidence falls far short of showing a violation of federal standards in the confession, the pretrial publicity, or assistance of counsel. Thus, the guilty plea was not poisoned by the taint of any other federally impermissible proceeding.

The guilty plea was influenced but not legally coerced by petitioner's counsel and father and it was primarily motivated by a realistic fear of the death penalty. Thus, the guilty plea was constitutionally permissible within the rule of Albrecht v. Nelson, No. 26635, June 28, 1972, Ninth Circuit, and all of the cases cited therein.

The Court does, however, express the hope that the State will provide psychiatric treatment for persons like petitioner, where such treatment is apparently not now available. This hope is based on the view that prisoners are human beings who, while they are properly imprisoned, are nevertheless entitled to proper medical care both physical and mental. This is so not only for their sake as human beings, but also for the protection of society. In recent years, we have seen too many go untreated, who when released have blindly and senselessly struck down persons whose deaths or disability have been a great and grievous loss to our country.

. . . . . .

. . . . . .

It is true that we need to think about the victims of crime and not just the criminals, but we also need to think about how not to have another victim.

DATED this 21st day of July, 1972.

C. A. MUECKE
United States District Judge

FILED

JUL 21 1972

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| JAMES BURCHETT, Petitioner, | ) | |
| vs. | ) | No. CIV 71-401 PHX - CAM |
| FRANK EYMAN, Warden Arizona State Prison, | ) | JUDGMENT |
| Respondent. | ) | |

In accordance with the foregoing Findings of Fact and Conclusions of Law, the petition for habeas corpus in the above matter is denied.

DATED this 21st day of July, 1972.

C. A. MUECKE
United States District Judge

APPENDIX B

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| JAMES BURCHETT, *Appellant,* vs. HAROLD J. CARDWELL, Warden, Arizona State Penitentiary, *Appellee.* | No. 72-2685 OPINION |

[February 25, 1974]

Appeal from the United States District Court
District of Arizona

Before: KOELSCH, DUNIWAY and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

This is an appeal from the denial of appellant's habeas corpus petition in which he charged that his pleas of guilty to: (1) assault with intent to commit rape, and (2) kidnapping and statutory rape in the state court of Arizona[1] were unconstitutionally induced by: (a) coercion of police while appellant was mentally unbalanced; and, (b) ineffective assistance of counsel, both of which combined under a totality of circumstances to render the guilty pleas involuntary.

At the outset, the appellant is faced with the now well established legal precept that when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense of which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty pleas. A defendant may

[1] *State v. Burchett*, 107 Ariz. 185, 484 P.2d 181 (1971).

only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann v. Richardson*, 397 U.S. 759 (1970). See *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

The district court, after an exhaustive hearing, rejected each of appellant's factual claims, and found that the plea was voluntary and that appellant had effective assistance of counsel. Our examination of the record convinces us of the correctness of the district court's findings. In these circumstances, the lower court's findings must control. *Pine v. Estelle*, 470 F.2d 721, 722 (CA9 1972); *Albrecht v. Nelson*, 462 F.2d 623 (CA9 1972); *Moss v. Craven*, 427 F.2d 139 (CA9 1970). The facts are such that their recital would add nothing to the validity of our conclusions.

There is no similarity between the record before us and the factual pattern presented in *Davis v. North Carolina*, 384 U.S. 737 (1966), relied upon by appellant, where the police activity included: (1) repeated police interrogation without outside advice for sixteen days; (2) a low nutrition diet; (3) forcing the accused at 5:00 A.M. to retrace his whereabouts on the night of the crime; and (4) other subtlety deceptive police tactics, all of which led to a confession. No such police activity appears in this record.

Additionally, appellant claims: (1) that Arizona Revised Statute § 13-492(c), as construed and represented to appellant at the time of his decision to enter a plea of guilty, placed an unconstitutional taint on the legislation, and (2) that the construction of the same statute by the supreme court of Arizona so as to permit a sentencing judge to impose a sentence of life imprisonment for kidnapping was in direct conflict with the sentencing requirements of Arizona Revised Statute § 13-1643.

Even conceding, which we do not, that Arizona Revised Statute § 13-492(c), presents constitutional problems under the teaching of *United States v. Jackson*, 390 U.S. 570 (1968), the issue cannot be raised where a plea of guilty is voluntarily made with the assistance of effective counsel. *Parker v. North Carolina*, 397 U.S. 790 (1970). We additionally find no constitutional error in the supreme court of Arizona's construction of Arizona Revised Statute

§ 13-492(c), which would allow the trial court to impose a life sentence.

*State v. Bennin*, 107 Ariz. 1, 480 P.2d 651 (1971); *State v. Wheatley*, 106 Ariz. 524, 479 P.2d 409 (1971); and *State v. Burchett, supra*, dispose of appellant's second point. Appellant's reliance on *Ard v. State*, 102 Ariz. 221, 427 P.2d 913 (1967), and *State v. Foggy*, 101 Ariz. 459, 420 P.2d 934 (1967), is entirely misplaced. Simply stated, the law of *Ard* is that in the *absence of statutory authority*, the imposition of the life sentence is improper in jurisdictions having a mandatory indeterminate sentence law. The statute under which appellant was prosecuted, Arizona Revised Statute § 13-492(c), specifically requires the imposition of the life sentence. See *State v. Burchett, supra*. Despite appellant's argument to the contrary, *Johnson v. Arizona*, 462 F.2d 1352 (CA9 1972), is not in point. There, we held that the Arizona courts might have denied appellant the equal protection of Arizona law by the manner in which they applied the results of the decisions in *Ard, supra*, and *Foggy, supra*. Appellant points to no similar treatment of defendants sentenced under § 13-492(c).

Moreover, it was within the trial court's power to sentence appellant to consecutive life terms. *State v. Burchett, supra; State v. Bennin, supra;* and *State v. Wheatley, supra*.

Finally, appellant argues that he was denied due process because only three of the five justices of the Arizona Supreme Court heard the oral arguments on appeal. Appellant cites no authority in support of his contention, nor is support revealed by our extensive research. Closely in point, however, is our decision in *Dredge Corp. v. Penny*, 338 F.2d 456 (CA9 1964), where we held that the opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved.

Finding no error, we AFFIRM the judgment of the lower court.

APPENDIX C



plea with his attorney, that he was aware of the range between the maximum and minimum sentence which he could receive, that there were no threats made to induce a plea, that he didn't want to go to trial on the matter, and that the plea was made of his own free will. The court's interrogation, and the answers elicited from defendant, are substantially the same as those approved of in State v. Jennings, 104 Ariz. 3, 448 P.2d 59 (1968), and in our view are consistent with the standards set forth in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). We hold, therefore, that defendant Hansen's guilty plea to the charge of grand theft was knowing, voluntary and intelligent.

In an affidavit filed by defendant Hansen with the Superior Court, defendant asserted that he never wanted to plead guilty to anything but that he only did so because his attorney, Mr. Francone, told him that he would be put on probation and that if he would plead guilty Mr. Francone would take care of everything else. At the hearing on defendant's motion for a delayed appeal, attorney Francone denied ever having promised probation. The testimony of the two deputy public defenders who at different points in the proceedings represented the defendant, indicates that they both explained the guilty plea and its consequences in some detail, verbally and by writing notes in aid of their conversation.

[2, 3] By holding that defendant's plea of guilty was properly accepted by the trial court, we dispose of defendant's second contention. Hansen argues that his deafness prevented him from understanding the testimony offered at his preliminary hearing and that therefore he was unable to assist counsel in his own defense. In State v. White, 102 Ariz. 18, 423 P.2d 716 (1967), we held that when an accused pleads guilty to an information, he waives any defects in the preliminary examination. We further said that the right to have a preliminary hearing is a personal privilege for the benefit of the accused and he may either expressly or impliedly waive such privilege. Defendant Hansen is precluded from challenging his preliminary hearing on appeal. His guilty plea to grand theft acted as a waiver of his right to challenge the preliminary proceedings.

Defendant's conviction of grand theft is affirmed.

STRUCKMEYER, V. C. J., and McFARLAND, J., concur.

464 P.2d 964

STATE of Arizona, ex rel., Frank A. EYMAN, Warden, Arizona State Prison, et al., Petitioner,

v.

SUPERIOR COURT of the State of Arizona IN AND FOR the COUNTY OF PINAL, and T. J. Mahoney, a Judge thereof, Respondents,

James BURCHETT, Real Party in Interest.

No. 9823.

Supreme Court of Arizona, In Banc.

Feb. 13, 1970.

State sought writ of prohibition to prohibit the Superior Court, Pinal County, Mahoney, J., from proceeding with hearing on petition for writ of habeas corpus. The Supreme Court, Hays, J., after granting an alternative writ of prohibition, held that if, as petitioner asserted in his habeas corpus petition, petitioner was unaware of his right to appeal at time he was convicted of assault with intent to commit rape, rape, and kidnapping, he now might be entitled to an appeal pursuant to Supreme Court Rule, and, therefore, his petition for writ of habeas corpus was premature.

Writ of prohibition made permanent.

1. Habeas Corpus ⇐45.3(4)

If, as petition for habeas corpus asserted, petitioner was unaware of his right to appeal at time he was convicted of as-

sault with intent to rape, rape, and kidnapping, he now might be entitled to appeal pursuant to rule providing for delayed appeals and, therefore, his petition for writ of habeas corpus was premature. 17 A.R.S. Supreme Court Rules, rules 16, 16(a).

2. Habeas Corpus ⇐45.3(4)

Where a petition for writ of habeas corpus does not show on its face that all direct appeal remedies have been exhausted, a collateral attack cannot be made on the judgment of conviction or sentence.

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Gary K. Nelson, Atty. Gen., by Thomas M. Tuggle, Asst. Atty. Gen., Phoenix, for petitioner.

Lewis, Roca, Beauchamp & Linton, by Levi J. Smith, Phoenix, for real party in interest.

HAYS, Justice.

James Burchett, real party in interest and defendant below, was convicted of assault with intent to commit rape, rape, and kidnapping. For those crimes he received consecutive prison sentences of 10 to 14 years on the assault charge, 20 years to life for the rape offense, and life imprisonment without possibility of parole for kidnapping. Defendant failed to take a direct appeal from those convictions and sentences.

On June 4, 1963, approximately nineteen months after his convictions, defendant Burchett filed, in propria persona, a "Petition for Judicial Writ of Nunc Pro Tunc (Review)," which the Maricopa County Superior Court treated as an untimely appeal and dismissed without a hearing on August 23, 1963.

Some six years later, in August of 1969, defendant filed a petition for writ of habeas corpus with the Pinal County Superior Court, contending among other things that his confinement at the state prison was illegal because (a) the penalty provisions of the state kidnapping statute are unconstitutional, (b) his pleas of guilty to kidnapping and rape were not voluntary but were coerced by threats, promises, and fear of the death sentence, and (c) his sentences purported to be consecutive even though no starting date was enumerated for any one of them. Judge Mahoney of the Pinal County Superior Court issued an order for a writ of habeas corpus to the warden of the Arizona State Prison, and directed that an evidentiary hearing be held in order to look into the factual allegations of defendant Burchett's petition. Prior to the time that such a hearing could be held, the State of Arizona sought a writ of prohibition from this Court in order to prohibit the Pinal County Superior Court from proceeding with the matter below. We issued an alternative writ of prohibition on November 18, 1969, directing Judge Mahoney to refrain from any further proceedings concerning the case.

[1] We hold that defendant's petition for writ of habeas corpus directed to the Superior Court was premature, for the reason that defendant had not exhausted his appellate remedies in the courts of this state. On April 29, 1964, after petitioner had filed his above described nunc pro tunc petition, Rule 16 of the Rules of the Supreme Court was amended to permit delayed appeals to the Supreme Court. The amended rule reads as follows:

> "*Motion to Take Delayed Appeal.* A defendant who has, without fault on his part, failed to take an appeal within the sixty days prescribed by Rule 348 of the Rules of Criminal Procedure may, by written motion supported by affidavit, apply to this court for an order permitting him to take a delayed appeal. The clerk shall forthwith notify the attorney general who shall respond to such motion within five days." 17 A.R.S. Rules Sup.Ct., Rule 16(a).

This amendment was added prior to defendant's filing of his petition for writ of habeas corpus, which asserts: "Petitioner (defendant) did not appeal from the convictions and sentences here in question. * * * The possibility of available relief was never made known to him." If defendant was unaware, as his petition for writ of habeas corpus indicates, of his

right to appeal, he may now be entitled to an appeal pursuant to Rule 16(a), whereas he was not entitled to such relief prior to the amendment of the rule.

[2] We hold that where, as here, a petition for writ of habeas corpus does not show on its face that all direct appeal remedies have been exhausted, a collateral attack cannot be made on the judgment of conviction or sentence. The Pinal County Superior Court is presently without jurisdiction to entertain defendant's habeas corpus petition.

Writ of Prohibition made permanent.

LOCKWOOD, C. J., STRUCKMEYER, V. C. J., and UDALL and McFARLAND, JJ., concur.

~~104 P.2d 868~~

GREYHOUND PARKS OF ARIZONA, INC., an Arizona corporation, Appellant,

v.

Frank S. WAITMAN, Chairman; John K. Goodman, Vice-Chairman; Donald Butler, Al. A. Marth, and Tom Finley, Commissioners of the Arizona Racing Commission, Appellees.

Turf Paradise, Inc., an Arizona corporation; and Arizona Downs, an Arizona corporation, Intervenors.

No. 8875.

Supreme Court of Arizona, In Banc.

Feb. 6, 1970.

Complaint by dog racing interests against state racing commissioner seeking a declaratory judgment construing a statute which regulated competition between daytime dog racing and certain daytime horse racing, and horse racing interests intervened. The Superior Court of Maricopa County, Cause No. C-218945, Charles R. Hardy, J., construed statute contrary to construction urged by complainant and the complainant appealed. The Supreme Court, Haire, J., Court of Appeals, held that statute which provided that there could be no daytime dog racing the same day there was daytime horse racing in any county in which there was horse racing prior to January 1, 1968, was intended to place the restriction on daytime dog and horse racing in same county only in those counties where there had been horse racing prior to January 1, 1968.

Declaratory judgment reversed.

1. Statutes ⇐190

Where statute is ambiguous on its face, reviewing court must ascertain meaning intended by legislature from language used in statute, aided by canons and rules of statutory construction.

2. Statutes ⇐205

In construing ambiguous provision in statute, all parts and provisions must be considered and construed together, and construction adopted which harmonizes with context in which ambiguous provision occurs.

3. Constitutional Law ⇐48

Where different interpretations of ambiguous provision in statute are possible, construction should be adopted which avoids constitutional doubts.

4. Theaters and Shows ⇐2

Statute which provided that there could be no daytime dog racing on same day that there was daytime horse racing in any county in which there was horse racing prior to January 1, 1968, was intended to place restriction on daytime dog and horse racing on same day only in those counties where there had been horse racing prior to January 1, 1968. A.R.S. § 5-113, subsec. C.

5. Theaters and Shows ⇐2

Statute which provided that racing was permissible in either daytime or nighttime did not prohibit racing in both daytime and nighttime at same track, nor did it require that if such dual performances did occur, they be counted as two racing days. A.R.S. § 5-110, subsec. C.

APPENDIX D



as it is agreed that plaintiff by signing the release has prejudiced State Farm's right to subrogate.

The cases are not extensive in this field, probably because the attempt by insurance companies to subrogate medical payments is a rather recent trend, and the courts are not in agreement concerning the propriety of subrogation of medical pay provisions in insurance policies. See Annotation commencing at 19 A.L.R.3d 1054.

Some courts merely allow subrogation. Smith v. Motor Club of America Ins. Co., 54 N.J.Super. 37, 148 A.2d 37 (1959). Some cases hold that a claim for personal injury is assignable and that therefore there is no impediment in a subrogation clause medical payments provision. Davenport v. State Farm Mutual Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965). Another view is that the subrogation clause in a medical payments provision of an insurance policy does not constitute an assignment of the personal injury claim and therefore the subrogation clause should be enforced. DeCespedes v. Prudence Mut. Cas. Co., 193 So.2d 224 (Fla.App.1966).

[1-3] This court, however, has taken the position in denying review in the case of Harleysville Mutual Insurance Company v. Lea, 2 Ariz.App. 538, 410 P.2d 495 (1966) that subrogation amounts to an assignment and that a claim for personal injuries is not assignable:

"Although the historical reasons given for the non-assignment of a personal injury claim have been based mostly on the non-survivability of the cause of action, we believe that the non-assignability rule standing alone has much support in public policy. * * * [A]llowing the subrogation or assignment of a cause of action for personal injuries is so fraught with possibilities, that the rule in Arizona against assignment should remain the same until changed by the legislature." Supra, 2 Ariz.App., at 542, 410 P.2d, at 499.

We agree with the Missouri Court of Appeals:

"Our determination of this appeal as to defendant Losinsky rests solidly upon the long-recognized and well-established legal principle prohibiting assignment of a cause of action for personal injury; and we find no consideration of 'public policy' which would justify us in ignoring, hewing through, or carving an exception in, that legal principle for the purpose of enabling instant plaintiff (and those of like inclination) to become subrogated as to medical payments coverage and thereby, so we think, lifting the lid on a pandora's box crammed with both practical and legal problems." Travelers Indemnity Company v. Chumbley, 394 S.W.2d 418, 423, 19 A.L.R.3d 1043, 1053 (Mo. App.1965).

Judgment affirmed.

UDALL and LOCKWOOD, JJ., concur.

484 P.2d 181

**The STATE of Arizona, Appellee,**
**v.**
**James BURCHETT, Appellant.**
**No. 2124.**

**Supreme Court of Arizona,**
**In Banc.**

**April 27, 1971.**

**Rehearing Denied May 25, 1971.**

Delayed appeal from convictions in the Superior Court, Maricopa County, Causes No. 37252, 39003, E. R. Thurman, J., for assault with intent to commit rape, kidnapping, and statutory rape. The Supreme Court, Cameron, J., held that where, under factual situation presented, facts of kidnapping could be eliminated and rape conviction would stand, and facts of rape could be eliminated and kidnapping charge would stand, physical acts relating to kidnapping and rape were not so intertwined that rape victim's movement in defendant's

automobile was insufficient to support independent conviction for kidnapping.

Affirmed.

1. Kidnapping ⇐6
Rape ⇐64

Sentences of life without possible parole on kidnapping conviction, 20 years to life on rape conviction, and 10 to 14 years on assault with intent to commit rape conviction were within statutory limits and were not an abuse of discretion. A.R.S. §§ 13-252, 13-492, 13-611, subsec. 1.

2. Criminal Law ⇐981(1), 1216(3)

Sentence to life imprisonment may be followed by another consecutive sentence for a term; overruling in part State v. Howland, 103 Ariz. 250, 439 P.2d 821 and State v. Crow, 104 Ariz. 579, 457 P.2d 256. A.R.S. §§ 13-1652, 31-251, 31-252; 17 A.R.S. Rules of Criminal Procedure, rules 338, 339.

3. Kidnapping ⇐6

Kidnapping statute allows judge on a guilty plea to sentence defendant either to death or life imprisonment where victim has been harmed. A.R.S. § 13-492.

4. Constitutional Law ⇐257
Jury ⇐31(11)
Kidnapping ⇐6

Arizona kidnapping statute which provides that trial court may, in place of jury, sentence to death or life imprisonment upon guilty plea without possibility of parole was not coercive on theory that it was violative of defendant's fifth amendment right to plead guilty and sixth amendment right to jury trial. A.R.S. § 13-492; 18 U.S.C.A. § 1201; U.S.C.A.Const. Amends. 5, 6.

5. Kidnapping ⇐1

Where, under factual situation presented, facts of kidnapping could be eliminated and rape conviction would stand, and facts of rape could be eliminated and kidnapping charge would stand, physical acts relating to kidnapping and rape were not so intertwined that rape victim's movement in defendant's automobile was insufficient to support independent conviction for kidnapping. A.R.S. §§ 13-492, 13-611, subsec. 1.

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Gary K. Nelson, Atty. Gen., by Carl Waag, former Asst. Atty. Gen., and Jack McCormick, Asst. Atty. Gen., Phoenix, for appellee.

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CAMERON, Justice.

This is a delayed appeal from two cases wherein the defendant pleaded guilty, was adjudged guilty and sentenced thereon.

We are called upon to determine:

1. whether the court committed error in ordering the sentences to run consecutively instead of concurrently,
2. whether the defendant knowingly, intelligently, and voluntarily entered his plea of guilty as to the offenses and particularly as to the crime of kidnapping, and
3. whether there is factual support for the kidnapping conviction.

The facts necessary for a determination of this matter on appeal are substantially as follows. On 7 March 1961 (in the first case), the defendant entered his plea of guilty to assault with intent to commit rape. § 13-252 A.R.S. On 17 March 1961, the trial judge ordered that the imposition of sentence be suspended for five years on condition that defendant conduct himself as a law-abiding citizen in all respects and that the defendant voluntarily report to a sanitarium in California. He was admitted to the sanitarium and released five months later, with the explanation, according to defendant's mother, that the facilities were no longer of benefit to him and that he should not be there confined against his will.

On 30 September 1961 (in the second case), defendant was arrested and charged with kidnapping, in violation of § 13-492 A.R.S., and rape (statutory) in violation of § 13-611, subsec. 1 A.R.S. A preliminary

hearing was waived, an information was filed in the Maricopa County Superior Court on 11 October 1961, and on 15 November 1961, the time set for trial, defendant withdrew his not guilty plea and plead guilty to both counts as charged. On 29 November 1961, defendant was sentenced in the second case on Count I, kidnapping, to a life sentence without possibility of parole and on Count II, rape, to twenty years to life. The sentences were designated by the trial court to run consecutively.

Also on 29 November 1961, but in the first case, an order was entered revoking defendant's probation and imposing a sentence of ten to fourteen years to run consecutive to the sentences imposed in the second case. Thus, defendant was to serve three consecutive sentences:

1. a natural life sentence without possibility of parole,
2. twenty years to life, and
3. ten to fourteen years.

After other proceedings (see State ex rel. Eyman v. Superior Court, 105 Ariz. 372, 464 P.2d 964 [1970]) not relevant to this opinion, defendant was granted a delayed appeal as to both cases and the three sentences.

## WAS THE DEFENDANT PROPERLY SENTENCED?

[1] We must first determine whether the trial court was correct in the manner in which the defendant was sentenced. The sentencing of the defendant in the second case was as follows:

"It is the judgment and order of the court, that the defendant serve a sentence as to Count I kidnapping, for the term of your natural life, life imprisonment without the possibility of parole. With respect to Count II—rape, statutory, It is the Judgment and Order of the Court that the Defendant serve not less than Twenty (20) years to life, said sentence to run consecutively with the sentence in the Count I."

The sentencing of the defendant in the first case was as follows:

"It is the Judgment and sentence of the Court that the defendant is sentenced to serve a term of not less than Ten (10) years, nor more than Fourteen (14) years in the Arizona State Penitentiary at Florence, Arizona, said sentence is to run consecutively with the sentences imposed this date in case No. 39003, defendant is committed to custody of the sheriff for transportation to Florence, Arizona."

The sentences were all within the statutory limits, therefore not an abuse of the trial court's discretion. State v. Moody, 67 Ariz. 74, 190 P.2d 920 (1948); State v. Davis, 105 Ariz. 408, 467 P.2d 743 (1970).

[2] Defendant next contends, however, that the court should not have sentenced the defendant to serve consecutive terms. The applicable statutes are:

"Rule 338. Beginning date required in sentence imposing imprisonment

"When the sentence imposes imprisonment, it shall state the date at which the imprisonment is to begin."

"Rule 339. Sentence; when concurrent and when consecutive

"When the defendant has been convicted of two or more offenses charged in the same indictment or information, the terms of imprisonment shall be served concurrently unless the court expressly directs that they or some of them be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless the court expressly directs that they or some of them be served concurrently."

§ 13-1652 A.R.S. provides the term of imprisonment starts to run "only upon actual delivery" to the prison.

It is clear that the trial judge intended the three sentences to run consecutively as permitted by Rule 339. State ex rel. Jones v. Superior Court In and For The County of Pinal, 78 Ariz. 367, 280 P.2d 691 (1955).

"• • • A judgment must be reasonably construed in accordance with the intent of the trial court, if the language discloses such intent clearly and without doubt or obscurity. • • •" Hogan v. Hill, 12 F.Supp. 873, 874 (1935).

When consecutive sentences are imposed, as the Criminal Rule 339 allows, it is not possible to have a more specific starting date for subsequent sentences other than that they will commence at the expiration of prior sentences. State v. Owen, 2 Ariz.App. 580, 410 P.2d 698 (1966).

The defendant contends, however, that prior cases of this court holding that it is error to sentence to life imprisonment to be followed by another consecutive sentence applies in this case. State v. Howland, 103 Ariz. 250, 439 P.2d 821 (1968); State v. Crow, 104 Ariz. 579, 457 P.2d 256 (1969).

A careful consideration of the rationale in these cases leads us to believe that we were in error in holding that a life sentence cannot precede a sentence for a term. Under the present approach to penology with "good" time and "straight" time (§§ 31-251, 31-252 A.R.S.) and other inducements for the rehabilitation of the prisoner as well as for maintaining discipline of the prisoner while confined, the length of any sentence cannot be said to be capable of precise determination on the day sentence is imposed. This is true whether the term is for a definite period of years or whether it is for life imprisonment. A life sentence is seldom a sentence for the life of the defendant, and a sentence for a period of time is seldom for the time indicated at sentencing. We do not believe it does violence to Rule 338 of the Rules of Criminal Procedure, 17 A.R.S., which requires that the date at which the initial imprisonment is to begin to hold that later consecutive sentences do not begin until after the prisoner has served the prior sentences. All this rule requires is that the judge when sentencing either concurrently or consecutively, must indicate to the authorities when the time for imprisonment is to begin. Once imprisonment starts, it may run on sentences that are consecutive or concurrent and if consecutive, successive sentences will then be determined by the expiration of the preceding sentences. So much of State v. Howland and State v. Crow, supra, which hold that the court may not impose a life sentence to be followed by another consecutive sentence is overruled by this opinion.

## WERE THE PLEAS VOLUNTARILY ENTERED?

We have reviewed the record and we find that the pleas both as to the first offense and as to the two counts of the second offense were voluntarily, intelligently, and knowingly made. It should be noted that Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) is not retroactive and would not apply to this case. State v. Griswold, 105 Ariz. 1, 457 P.2d 331 (1969). Appellant contends, however, that his plea of guilty to the kidnapping charge was coerced because the statute itself is coercive. The defendant cites the United States Supreme Court case of United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) which held unconstitutional a portion of the Federal Kidnapping Statute as being violative of the Fifth Amendment right to plead guilty and exercise of the Sixth Amendment right to a jury trial wherein the statute provides that only the jury can provide the death penalty.

[3] We must first determine whether our statute on kidnapping allows the judge on a guilty plea to sentence the defendant to death or life imprisonment where the victim has been harmed as in this case. Our statute reads:

"§ 13-492. Kidnaping for extortion, robbery, ransom, rape, sodomy, lewd or lascivious acts; punishment

• • • • • •

"C. A person convicted under subsections A or B of this section shall be punished as follows:

"1. If the person subjected to the acts mentioned in subsections A or B suffers

serious bodily harm inflicted by the person found guilty, the person found guilty shall be punished by death or by life imprisonment without possibility of parole, whichever the jury recommends.

"2. If the person subjected to any acts mentioned in subsection A or B does not suffer serious bodily harm the person found guilty shall be punished by imprisonment in the state prison from twenty to fifty years without possibility of parole until the minimum sentence has been served. As amended Laws 1956, Ch. 92, § 1."

The defendant in the instant case was sentenced to life imprisonment without possibility of parole. We believe, however, that the judge upon a guilty plea may sentence to either death or life imprisonment. This is the only punishment indicated for kidnapping where the victim has been harmed and to give a contrary construction would mean that the court could never accept a plea of guilty and pronounce sentence where there has been bodily harm done to the kidnapping victim. This would place an absurd construction upon the statute and deny to the defendant the right to plead guilty when charged under Paragraph 1 and require him to be tried to the jury. We therefore hold that the trial court may, in place of the jury, sentence to death or life imprisonment without possibility of parole.

The Federal Kidnapping Statute involved in this case reads as follows:

"Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnapped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

18 U.S.C.A. § 1201.

The United States Supreme Court noted that this statute "shifted from a single judge to a jury of 12 the onus of inflicting the penalty of death." United States v. Jackson, supra, 390 U.S. at 576, 88 S.Ct. at 1213. The United States Supreme Court went on to state:

"Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. * * *" United States v. Jackson, supra, 390 U.S. at 581, 88 S.Ct. at 1216.

[4] Unlike our statute the punishment portion is in the disjunctive, providing for death if the "jury shall so recommend" *or* by life imprisonment. We hold that under the Arizona statute the judge may impose the death penalty upon a plea of guilty despite the provision referring to the jury. Our statute does not provide, as does the federal statute, that the defendant shall receive death if the jury recommends or otherwise by life imprisonment, but it states death or life imprisonment without possibility of parole whichever of the two punishments the jury recommends. As we have stated, to hold that upon a plea of guilty the judge could not so sentence to death or life imprisonment would mean that a defendant could never plead guilty to kidnapping where the victim has been harmed, clearly not the intent of the legislature nor the clear meaning of the statute.

We therefore hold that Jackson, supra, does not apply and that the statute was not coercive.

DO THE FACTS SUPPORT A KIDNAPPING CONVICTION?

Finally, the defendant contends that the kidnapping conviction is unsupported by the evidence as shown in the Statement of Facts On Conviction and should be reversed. The relevant portion of such statement is as follows:

"Statement of Facts On Conviction No. 39003

"The facts and circumstances surrounding the commission of the crime are as follows:

"On September 30, 1961, at approximately 4:45 p. m., the defendant drove into the alley at 6712 North 32nd Drive in Phoenix. There he observed four year old Catherine Irene Bowser playing in her yard. He lured the child from the yard and into his car and then drove to an alley nearby where he sexually assaulted her. He first introduced a finger into her vagina causing bleeding; he then attempted to have sexual intercourse with the child, but was unable to make a complete entrance. The defendant then pulled his trousers and shorts down to his knees and masturbated until he reached a climax.

"Upon completion of this act, the defendant took the girl to her home, where he was met by the girl's father. The defendant told Mr. Bowser, 'Take this little girl, she needs help; she's been hurt; I found her down the street.' Mr. Bowser took the child from the car, handed her to Mrs. Bowser and told the defendant that the police had been called and for him not to leave. As a preventative against escape, Mr. Bowser removed the keys from the defendant's vehicle. Shortly thereafter, the police arrived and took the defendant into custody. Once downtown at police headquarters, the defendant gave a complete statement regarding the crime and admitting his guilt.

"Dr. C. F. Dalton who treated the victim, stated that the entire vaginal vault was torn and split to the rectal opening. He said that normally the victim's vagina may admit one finger but in this torn state the vagina admitted three fingers. He stated that it took between 20 and 25 stitches to close the tears. The doctor also observed a large bruise on the left, outside thigh of the victim just below the buttock, as large as the palm of his hand."

The defendant asserts that the statement of facts indicates that the victim willingly entered his car and was driven some short distance to where the alleged rape occurred. This court has affirmed a kidnapping conviction based on evidence that the defendant inveigled or enticed a six year old child into his automobile for the purpose of committing lewd or lascivious acts upon his person. State v. Wahrlich, 105 Ariz. 102, 459 P.2d 727 (1969). We consider the fact that the defendant, Burchett, lured the victim, a four year old girl, from her yard and into his car, sufficient to bring the act within the purview of the statute.

[5] However, the defendant contends that the physical acts relating to the kidnapping and rape are so intertwined that the movement in the automobile of the victim is not sufficient to support an independent conviction for kidnapping. We do not consider the two offenses as being intertwined, but instead the crime of kidnapping preceded and was complete before the rape took place. The component elements of the two crimes are distinct and separate. State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960). The practical test to determine if the elements are identical is to eliminate the elements in one charge and determine whether the facts left would support the other charge. State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970). In this case, the facts of the kidnapping could be eliminated and the rape conviction would stand, and the facts of the rape could be eliminated and the kidnapping charge could stand. The present factual situation clearly supports a kidnapping and a rape conviction.

State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963); State v. Padilla, 106 Ariz. 230, 474 P.2d 821 (1970).

Judgments affirmed.

STRUCKMEYER, C. J., HAYS, V. C. J., and UDALL and LOCKWOOD, JJ., concur.

954 P.2d 191

The STATE of Arizona, Appellee,
v.
Charles SCHMID, Appellant.
No. 1837.

Supreme Court of Arizona,
In Banc.
April 28, 1971.

Rehearing Denied May 25, 1971.

Defendant was convicted before the Superior Court of Pima County, Richard N. Roylston, J., of second-degree murder, and he appealed. The Supreme Court, Udall, J., held that failure to exclude for cause each prospective juror who had expressed prior opinion about defendant's guilt and who knew of relationship of prosecution's witnesses to the defendant or of any aspect of the case was not error, where defendant admitted there was no place within the United States where he could have been tried by jury totally ignorant of some aspect of the case. The court further held that permitting introduction of evidence of other murders by defendant was not error, where defendant allegedly committed other murders in attempt to keep victims from informing authorities of his boastful admissions to them regarding his having killed murder prosecution victim.

Affirmed.

Hays, V. C. J., did not participate.

1. Criminal Law ⇐121, 586

Change of venue or continuance are not granted as matter of right but are, rather, matters addressed to sound discretion of trial judge.

2. Criminal Law ⇐1150, 1151

Trial judge's ruling on motion for change of venue or continuance will not be disturbed on appeal unless clear abuse of discretion appears and is shown to be prejudicial to defendant's cause.

3. Criminal Law ⇐121, 586

Failure, in murder prosecution, to grant motions for postponement or change of venue was not abuse of discretion.

4. Criminal Law ⇐126(1), 591

Fact that all empanelled jurors in murder prosecution had some degree of knowledge of facts of the case did not, in and of itself, demonstrate such prejudice as would have necessitated change of venue or continuance, although it was an important factor to be considered by trial judge in ruling on such motion.

5. Jury ⇐99(2)

Failure, in murder prosecution, to exclude for cause each prospective juror who had expressed prior opinion about defendant's guilt and who knew of relationship of prosecution's witnesses to the defendant or of any aspect of the case was not error, where defendant admitted there was no place within the United States where he could have been tried by jury totally ignorant of some aspect of the case. 17 A.R.S. Rules of Criminal Procedure, rule 220.

6. Criminal Law ⇐369(1)

In prosecution of one accused of particular offense, evidence which tends to show that accused has or may have committed some other crime entirely distinct from that for which he is now on trial is generally inadmissible.

7. Criminal Law ⇐369(15), 371(1, 12), 372(1)

Evidence of other criminal acts is competent to prove specific crime charged when it tends to establish motive, intent, absence of mistake or accident, common scheme or plan embracing commission of two or more crimes so related to each other that proof of one tends to establish the

SUPREME COURT, U. S.

FILED

JUN 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JAMES RUMSEY,

Petitioner,

-vs-

HAROLD J. CARDWELL, Warden,
Arizona State Penitentiary,

Respondent.

NO. 73-1767

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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| JAMES BURCHETT,<br><br>Petitioner,<br><br>-vs-<br><br>HAROLD J. CARDWELL, Warden,<br>Arizona State Penitentiary,<br><br>Respondent. | ) | NO. 73-1767 |

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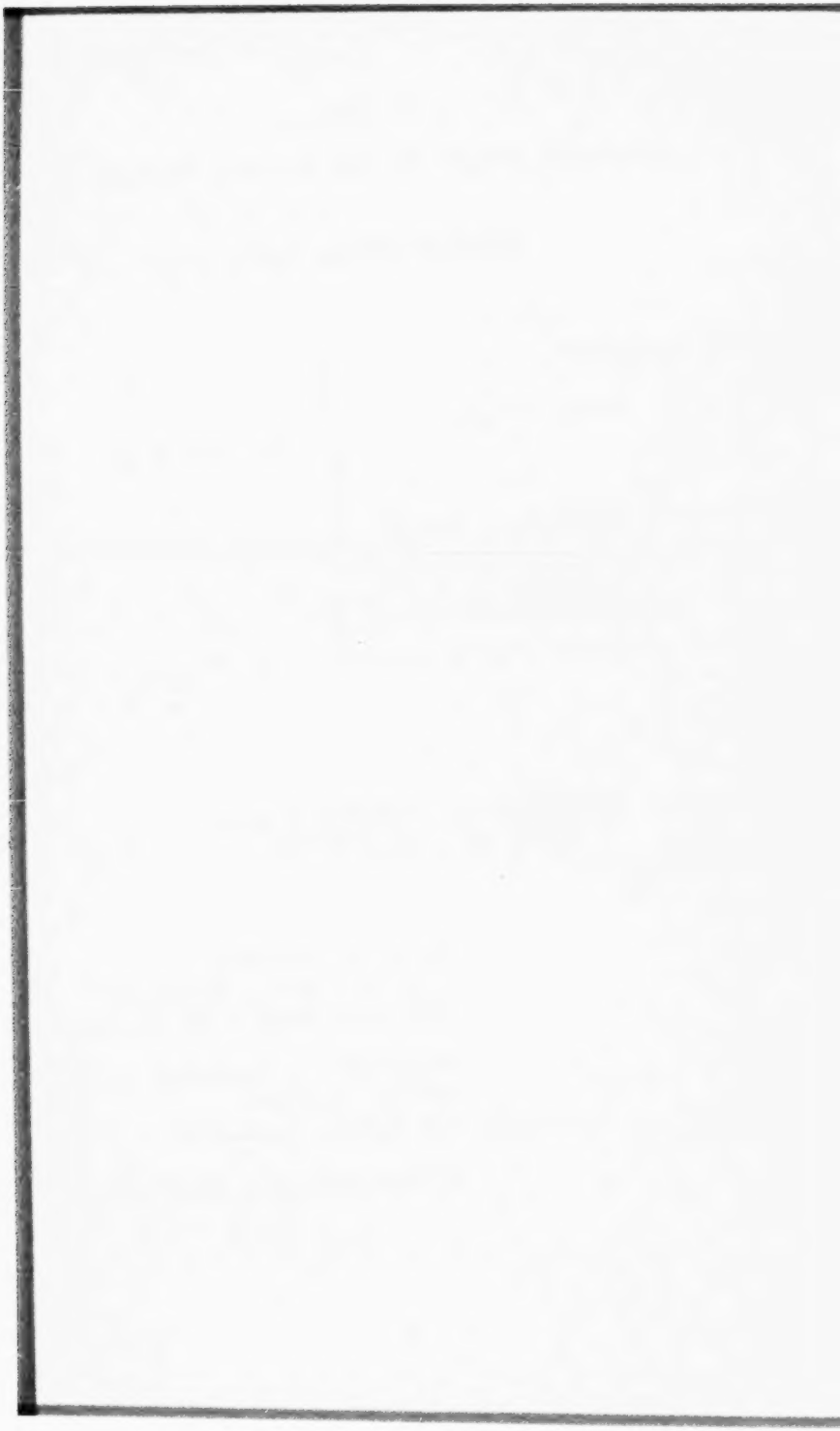

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## QUESTIONS PRESENTED

I. DID THE PETITIONER RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

II. WERE THE FINDINGS OF THE COURTS BELOW THAT PETITIONER VOLUNTARILY ENTERED HIS GUILTY PLEAS SUPPORTED BY THE RECORD?

III. DID THE CIRCUMSTANCES UNDER WHICH THE SUPREME COURT OF ARIZONA AFFIRMED PETITIONER'S CONVICTION DENY HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

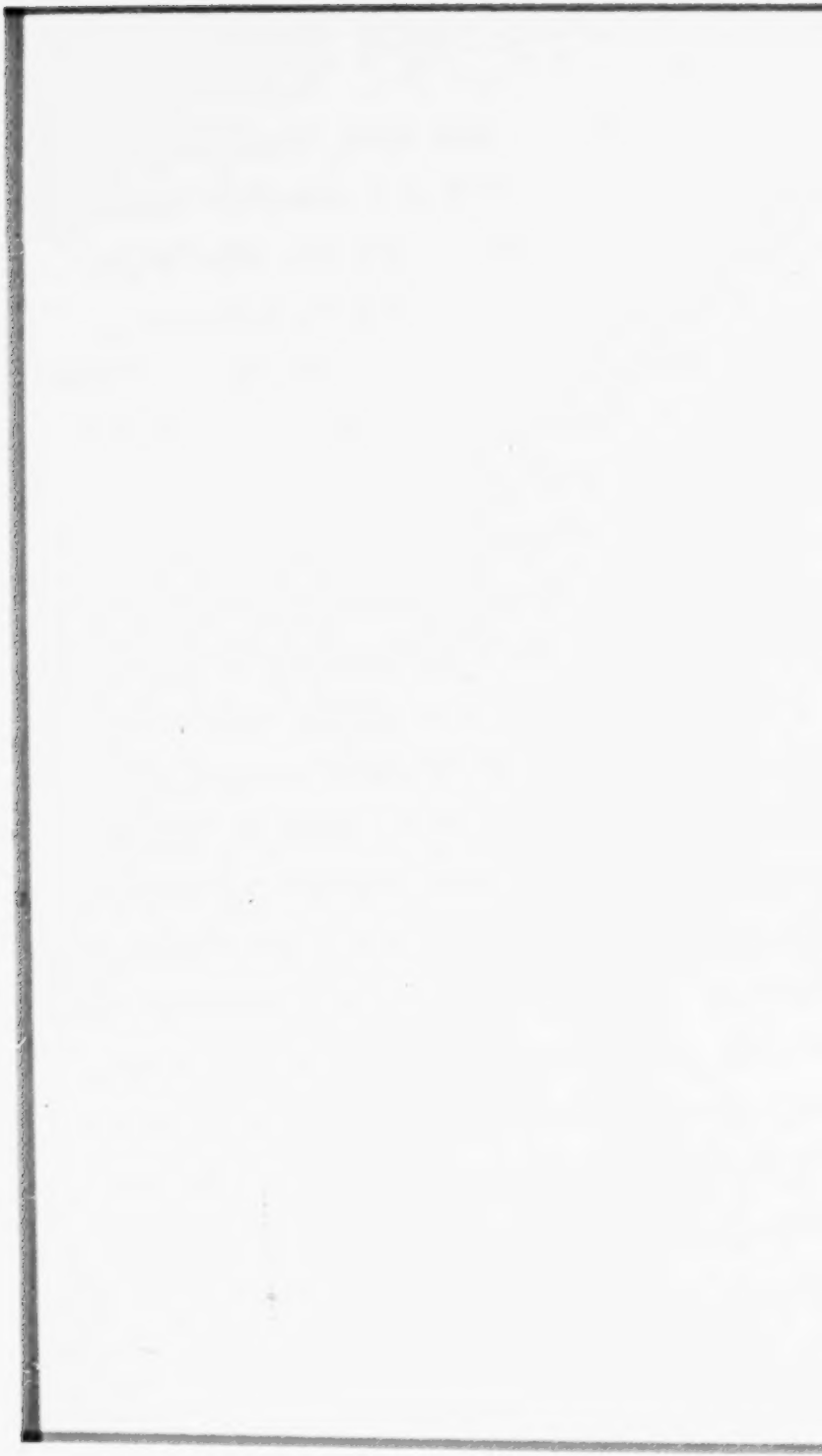
## STATEMENT OF THE CASE

Respondent would accept petitioner's Statement of the Case, subsection (A) regarding the proceedings in the courts below. Respondent's acceptance of subsection (A), however, wherein it states that the District Court granted a certificate of probable cause does not mean that respondent in any manner whatsoever agrees that there were any valid grounds for appeal. Respondent expressly rejects the remainder of

petitioner's Statement of the Case and puts every remaining statement therein in issue.

At the evidentiary hearing in this matter, Dr. Tuchler, a psychiatrist called by petitioner, stated that petitioner's personality was very passive during the time surrounding the charges in question. The doctor also stated that, except for this incident, he never saw petitioner from 1959 to 1963 or 1964 (R.T. 13-14). The doctor also stated that petitioner was never in the passive state of mind. During the times he had actually examined the appellant, he just assumed that such a state of mind developed (R.T. 48-49). Dr. Tuchler expressly said that petitioner could intellectually judge right from wrong (R.T. 35, 36). He also testified that it would be "difficult" to judge petitioner's state of mind by looking back from 1963 to 1961 as he was doing (R.T. p. 46). Dr. Tuchler further stated that petitioner had the ability in 1961 to discuss alternatives with

his attorney, to know what the death penalty was, that it existed as a possible penalty in his case and he would have the ability to discuss the facts of his case with his attorney. Dr. Tuchler also stated that petitioner's "passivity" was due to a number of factors including his parent's advice, his attorney's advice, the newspaper publicity about him and the death penalty and that this did imply some sort of judgment (R.T. 29, 41-42). Also pertinent to Dr. Tuchler's testimony regarding the petitioner's passive state is the fact that although Dr. Tuchler stated petitioner just returned the injured girl to her parents and waited for the police to come (R.T. 19), there is other evidence indicating that the keys were taken from his car and other actions taken by the victim's father so that he could not leave (Dt. Ct. Rec. p. 31).



Petitioner's second witness was his father who testified that petitioner did not just accept his father's decision to plead guilty but asked why he had come to that decision (R.T. 94), and that petitioner stated he did not "know what else we can do" (R.T. p. 94). Much of the father's testimony will be brought out infra in regard to petitioner's claims of ineffective assistance of counsel. However, petitioner's father did testify that he did not "recall" if the judge inquired about the voluntariness of the sentencing or not (R.T. 96). Petitioner's mother stated that she could not remember if any questions about voluntariness were asked at the sentencing (R.T. 127). The sentencing judge, however, stated he was certain he asked petitioner if he had anything to say or any legal cause why he should not pass sentence (R.T. 250). This judge also stated that the procedure he always followed when sentencing a case he was new to

was to be very cautious and that he tried to get the defendant to relax and always asked if any promises were made to the person being sentenced. He testified that he would not let the attorney answer for the defendant when asking if a plea was voluntary because it was "my responsibility" and he went along as if he did not know what other judges had done. (R.T. 250-255). He stated that his general practice in such cases was to make sure the defendant understood the charges and consequences of a guilty plea, and that after addressing the defendant personally, he would question his attorney to check more (R.T. pp. 241-243).

The police officer who first talked to Officer Bradley, testified that he and his partner had asked appellant if he wanted to call his parents or an attorney (R.T. 200-201). He testified that after a brief preliminary questioning period of about fifteen

to twenty minutes, he and his partner stopped questioning petitioner because the charges appeared serious, and they immediately called the county attorney on duty that night (R.T. 200, 202). The officer stated that he knew nothing about the facts of the case except as related by the petitioner, and that the case was still being investigated when he questioned petitioner (R.T. 198, 213-214). He stated that he believed petitioner's statements were voluntary because he knew that he had not promised petitioner anything, or threatened or coerced him (R.T. 212). He stated that he did not know petitioner had ever been hospitalized until the District Court evidentiary hearing (R.T. 211). He stated that petitioner did not write out any confession, and that petitioner was not shown a stack of open cases and asked if he had committed any of them (R.T. 207).

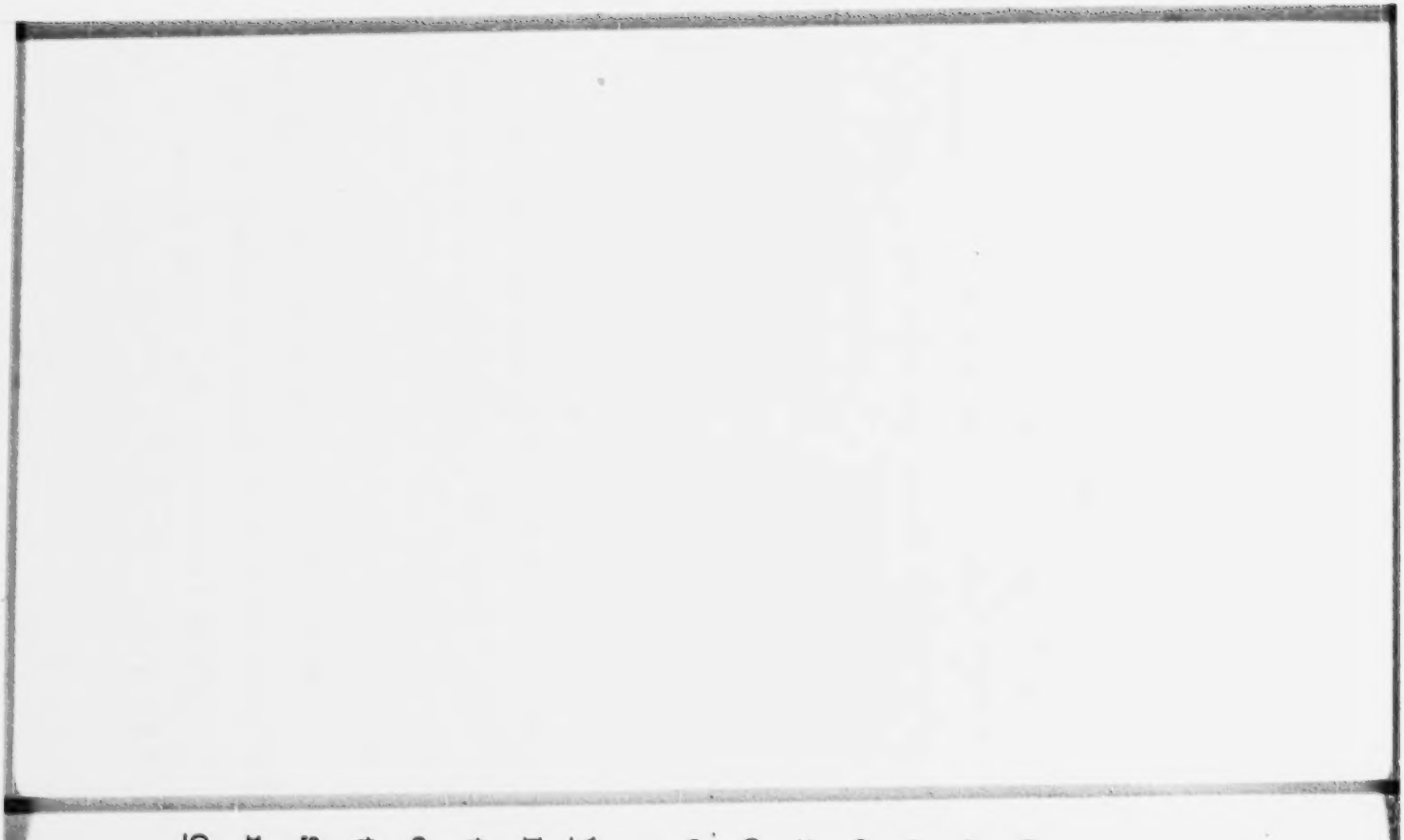
Mr. Roper, the County Attorney on duty, testified that he went to the station that night

with a court reporter and questioned petitioner (R.T. 218). He never made promises regarding sentences or treatment because he was not in a position to make such promises (R.T. 220, 234) and he was certain that petitioner had not written out a confession before he came, and that he did not write one while he was there (R.T. p. 228). He felt certain he asked petitioner if his statements were voluntary, of his own free will and not the result of coercion, threats, or promises (R.T. 220, 229-230, 235) that it was his "standard practice" to ask persons he was going to question if they had an attorney or wanted one and was fairly certain he had asked this of appellant (R.T. 222).

Finally, when petitioner testified he stated that he had waived the preliminary hearing because he knew about the confession and there was not any need to determine if a crime had been committed (R.T. 161).

And, the preliminary examination record expressly states that "defendant is informed of his right to aid of counsel" (Dt. Ct. Rec. p. 33). Petitioner then went on to testify that he pleaded guilty because he wanted hospital treatment not just because of what his father had said (R.T. 171) and that when the State Hospital returned him to prison (because of its decision, it could not help him), he went to the superintendent and told him the decision was wrong and that he still needed treatment (R.T. 178-179). Petitioner also testified that the guilty plea was "a decision that had to be made" because (1) there was no other place for him to go, and (2) to avoid the death penalty (R.T. 179-180).

He did not think about his plea and its voluntariness until after he talked to the "jailhouse lawyers" at the State Prison (R.T. 181).



## ARGUMENT

### I

### PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent contends that under Ninth Circuit tests for determining effective assistance of counsel the facts of this case are more than adequate to show that petitioner received effective assistance. Secondly, respondent would submit that the District Court's finding to this effect is not clearly erroneous.

The Ninth Circuit, in United States v. Valenzuela-Mendoza, 452 F.2d 773 (1972), has recently reiterated its rule that trial attorney's errors do not violate defendant's right to a fair trial unless they reduce the trial to a mockery or farce. Such a determination must be made from the record as a whole. Id. at 774; see Wright v. Craven, 412 F.2d 915, 917 (9th Cir. 1965);

United States v. Ragen, 166 F.2d 976, 980-981 (7th Cir. 1948); United States v. Silva, 418 F.2d 328, 331-332 (2d Cir. 1969); Slawek v. United States, 413 F.2d 957, 959 (8th Cir. 1969); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961).

The Supreme Court has recognized that the decision to plead guilty is at best very risky and uncertain, and that mere mistakes by an attorney will not render his assistance ineffective as long as it is within the normal bounds of competency. McMann v. Richardson, 397 U.S. 759, 769-771, 90 S.Ct. 1441, 1448-1449, 25 L.Ed.2d 763, 772-773 (1970). Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). A finding of denial of effective assistance of counsel is especially hard to establish when the gravamen of the defendant's claim is a tactical decision made by his attorney--(as appellee will show Mr. Later's decision was here).

See United States v. Moss, 438 F.2d 147, 149 (D.C. Cir. 1970); Morrison v. United States, 434 F.2d 532, 535 (D.C. Cir. 1970); Wright v. Craven, supra, at id., 718. Moreover, there is a presumption that an attorney is competent. See Kress v. United States, 411 F.2d 16, 22 (8th Cir. 1969); Busby v. Holman, 356 F.2d 75, 79 (5th Cir. 1966).

The petitioner argues that the Ninth Circuit standard for measuring effective assistance of counsel--reducing the proceedings to a farce or a mockery--is no longer applicable by virtue of a recent Sixth Circuit case, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) and two District of Columbia Circuit cases, Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967); and Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970). In none of these cases, however, do the Courts flatly reject the use of the language "farce and mockery" for other courts. They

recognize that this language may be merely conclusionary, used by the courts to indicate that there is a heavy burden on the defendant to show the unfairness necessary to violate the Sixth and Fourteenth Amendments, thus recognizing that some Courts may use the words "farce or mockery" when in reality their standard is no lower than that used by the District of Columbia and Sixth Circuits. Beasley v. United States, supra at 696; Scott v. United States, supra, at 610; Bruce v. United States, supra, at 116.

It should be pointed out that what the Circuit Court in Beasley found as error in the District Court's use of a "farce and mockery" standard was a finding on one hand that "the petitioner's attorney had been incompetent and ineffective in several respects" and on the other hand that the petitioner received effective assistance of counsel because the attorney's incompetence has not reduced

the trial to a "mockery or a farce". Clearly, that District Court used the "farce and mockery" language to justify a lower than acceptable standard. The Ninth Circuit, however often it has used that language in its opinions, has never used it to justify a lower than acceptable standard after it found that an attorney was in fact incompetent and ineffective. United States v. Valenzuela-Mendoza, supra; Wright v. Craven, supra. Thus, the standard for effective assistance of counsel used by the Ninth Circuit does not conflict with the standard used by the District of Columbia and Sixth Circuits.

Even assuming arguendo that the Ninth Circuit standard is lower than that in other circuits, the assistance given to the petitioner by Later would be found effective under the alleged stricter standard. At the evidentiary hearing in District Court, it was brought out that during the two days after he was appointed to represent petitioner, Mr. Later

engaged in investigation, had a copy of petitioner's confession, a copy of the doctor's report and was thoroughly familiar with what had happened (R.T. 83). Mr. Later had represented about four persons charged with similar crimes and at least one of the charges against these persons had been dropped (R.T. 84). Mr. Later met with petitioner's father two to five times and did more research after or during these meetings that appellant's father knew of. Mr. Later originally intended to make a plea of not guilty by reason of insanity (R.T. p. 86). However, after discussing the insanity defense with the State Hospital superintendent, Mr. Later dropped his Rule 250 (incompetency commitment) motion because the superintendent's statements and that of several other psychiatrists, led him to decide that since there was a written (not hand written however--just that it was "written") confession it would be best to plead guilty and hope for a life sentence from the judge (R.T. 87-90). There

was testimony that Later had talked with petitioner at different "times" (R.T. 89; see R.T. 91-92). There was also testimony directly contradicting petitioner by his father that Mr. Later came in and talked to petitioner for about five minutes the day the decision to plead guilty was made (R.T. p. 93). At the sentencing proceedings, Mr. Later made a plea in mitigation of appellant's sentence (R.T. p. 97). Mr. Later knew the time for appeal and investigated by looking for possible errors but said he felt there were no grounds for reconsideration (p. 99). Before the guilty plea was made, Mr. Later talked with someone from the County Attorney's office and he went with petitioner's father to try to negotiate a plea or have prosecution wait until things had "cooled off" (R.T. pp. 113-115).

Thus, it is apparent that the assistance afforded petitioner here is far above the in-

competence necessary to find that the counsel was so ineffective as to make a "mockery" of justice or that counsel was not "counsel reasonably likely to render and rendering reasonably effective assistance". Beasley v. United States, supra. Indeed, there are divers examples of assistance by counsel far below that afforded petitioner here being found effective. See, e.g. United States v. Junne, 458 F.2d 1156, 1157-1158 (3rd Cir. 1972) (counsel appointed only two days before trial); Dukes v. Warden, 406 U.S. 250, 252-256, 92 S.Ct. 1551, 1512-1515, 32 L.Ed.2d 45, 49-52 (1972) (counsel representing different defendants advised petitioner to plead guilty and got other defendants off by saying petitioner led them into a life of crime held no conflict sufficient to find ineffective assistance); Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419, 429-430 (1970) (defendant not denied effective

assistance when first met attorney on way to courtroom); Doughty v. Beto, 396 F.2d 128, 130 (5th Cir. 1968)(no denial of effective assistance when defendant pleaded guilty after meetings of not more than fifteen minutes with defendant).

Thus, respondent submits the District Court's finding that appellant had effective assistance of counsel is not clearly erroneous and should be affirmed.

## ARGUMENT

### II

### THE FINDINGS BY THE COURTS BELOW THAT BURCHETT'S GUILTY PLEAS WERE VOLUNTARILY ENTERED WERE SUPPORTED BY THE RECORD.

Respondent submits that there is more than enough evidence in the record to uphold the District Court's decision that petitioner's plea was not coerced but "was involuntary only in the sense that under the circumstances created by petitioner's own criminal acts and the admissible strong evidence of such acts it was the realistic choice open to him" (Dt. Ct. Rec. p. 189-190). The court did not have to accept Dr. Tuchler's opinions about appellant's lack of volition. The record shows that petitioner asked his father why he thought he should plead guilty, he did not just accept his advice (R.T. p. 99). Petitioner pleaded guilty because there was no other place for him to go. And to avoid the death penalty--

as he said, "it was a decision that had to be made" (R.T. 179-180). Contrary to petitioner's claims, Dr. Tuchler did not say that petitioner could not make intellectual judgments; and the doctor added that petitioner had the ability to understand the death penalty (see R.T. 37-42). Despite petitioner's claims that he never talked to his attorney the day of the decision to plead guilty, petitioner's father said Mr. Later talked to petitioner about five minutes that day and that petitioner then decided to plead guilty (R.T. 93). Moreover, Dr. Tuchler twice said that part of the reason for petitioner's unvolitional acceptance of a guilty plea was because of his attorney's advice (R.T. 29-30, 44). The sentencing judge stated he was certain he asked the petitioner if he had anything to say or any legal cause why he should not pass sentence (R.T. 250). This judge also stated that the procedure he

always followed when sentencing a case he was new to was to be very cautious and that he tried to get the defendant to relax and always asked if any promises were made to the person being sentenced. He testified that he would not let the attorney answer for the defendant when asking if a plea was voluntary because it was "my responsibility" and he went along as if he did not know what other judges had done (R.T. 250-255). He stated that his general practice in such cases was to make sure the defendant understood the charges and consequences of a guilty plea, and that after addressing the defendant personally, he would question his attorney to check more (R.T. pp. 241-243). Petitioner testified that he pleaded guilty because he wanted hospital treatment not just because of what his father had said (R.T. 171) and that when the State Hospital returned him to prison (because of its decision, it could not

help him), he went to the superintendent and told him the decision was wrong and that he still needed treatment (R.T. 178-179). Appellant also testified that the guilty plea was "a decision that had to be made" because (1) there was no other place for him to go, and (2) to avoid the death penalty (R.T. 179-180).

He did not think about his plea and its voluntariness until after he talked to the "jailhouse lawyers" at the State Prison (R.T. 181).

In addition, as respondent has shown, supra, that the petitioner received the effective assistance of counsel in making his guilty pleas.

Thus, respondent submits that the findings by the Courts below that petitioner's guilty pleas were voluntarily entered were supported by the record.

## ARGUMENT

### III

### THE CIRCUMSTANCES UNDER WHICH THE SUPREME COURT OF ARIZONA AFFIRMED BURCHETT'S CONVICTIONS DID NOT DENY HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Under Article 6, Section 2 of the Arizona Constitution, the Arizona Supreme Court is given the power to sit in division or en banc with not less than three justices. It is, thus, apparent that the procedure of using only three justices to hear oral arguments is valid under the Arizona Constitution. Oral argument is not a constitutional imperative and petitioner was granted a chance to be heard with a quorum of the court. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).

The United States Supreme Court has recognized that en banc proceedings are an in-

herent power of courts for unusual circumstances, and absent statutory regulations or other promulgated rules, courts may proceed en banc as they desire as long as they proceed consistently with due process. See generally United States v. American Foreign S.S. Corp., 363 U.S. 680, 688-690, 80 S.Ct. 1336, 1338-1339, 4 L.Ed. 1491, 1494-1495 (1960).

There are many other states that have rejected as without merit arguments similar to petitioner's. They hold that en banc proceedings require only a statutory quorum to proceed for the entire court, and that courts have inherent powers to regulate their procedures to go in division, en banc, or en banc through a quorum consistent with due process and equal protection. See, e.g., Nelson v. Union Wire Rope Corp., 39 Ill.App.2d 73, 135-136, 187 N.E.2d 425, 454 (1963); Wells v. Wells, 200 Pa.Super. 8, 10-11, 186 A.2d 844, 845 (1962);

Commonwealth v. Myers, 402 Pa. 202, 167 A.2d 274, 276 (1961); Bray v. Barry, 160 A.2d 577, 581 (Sup. Ct. R.I. 1960); Center School Dist. No. 58 of Jackson County v. Kenton, 345 S.W.2d 120, 129 (Sup. Ct. Mo. 1961); Fette v. City of St. Louis, 366 S.W.2d 446, 448-449 (Sup. Ct. Mo. 1963); Hoyt v. Hoyt, 351 S.W.2d 111, 114 (Ct. Civ. App. Tex. 1961).

Thus, respondent submits that the District Court was not clearly erroneous in rejecting petitioner's frivolous argument here, especially in light of the fact that the whole Arizona Supreme Court rejected his motion for rehearing en banc with all five justices.

## CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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The Attorney General
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WILLIAM J. SCHAFER III
Chief Counsel
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Attorneys for RESPONDENT

FILED
JUL 5 197
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1767

JAMES BURCHETT,

Petitioner,

v.

HAROLD J. CARDWELL, Warden,
Arizona State Penitentiary,

Respondent.

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# REPLY MEMORANDUM SUPPORTING PETITION FOR WRIT OF CERTIORARI

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IN THE

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REPLY MEMORANDUM SUPPORTING
PETITION FOR WRIT OF CERTIORARI

I. The Record Does Not Support The Lower Courts' Conclusions That Burchett's Guilty Pleas Were Voluntarily Given.

The principal issues involved in Burchett's Petition are whether his right to counsel was satisfied under the "effective assistance of counsel" standard and whether the record supported the lower courts' finding that Burchett's guilty pleas were voluntarily entered. Where

such constitutional issues are involved, this Court is not bound by the lower courts' factual conclusions but will re-examine the evidentiary basis on which those conclusions are founded. E.g., Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1478, (1960); Brooks v. Florida, 389 U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643 (1967); Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

In applying this standard, the record references in the Warden's Response do not sustain the lower courts' rulings. Dr. Maier Tuchler was the only psychiatrist who testified at the habeas corpus evidentiary hearing. He had treated Burchett regularly during 1958-1959 and had also seen him at the State Prison follow-

ing his convictions in late 1962, again in February 1963, and at various times thereafter (T.14). His qualifications to give opinions as a psychiatric expert witness were agreed to without question (T.9).

Pages 2-3 of the Response have mischaracterized the substance of Dr. Tuchler's testimony. Dr. Tuchler was firmly of the opinion that at the time of Burchett's guilty pleas, "he was essentially so full of shame, so hopelessly enmeshed in what he had done, and how it had happened, that he was really without volitional control in this matter " (T.48). Although Burchett could intellectually judge right from wrong, he lacked the "ability to control himself" (T.35-36). His passive dependency was determined by the opinions of others (T.39). Dr. Tuchler also believed Burchett was under

a tremendous amount of pressure from his parents, attorney, and otherwise at the time of the decision for him to plead guilty (T.44).

The Response has also mischaracterized the substance of Burchett's father's testimony. This testimony, also uncontradicted, was that he told Burchett that a guilty plea "was the only avenue he had to go" and that Burchett's counsel was not present at that time (T.93). He also stated that Burchett accepted the decision the father had made without question in any way, saying, "Dad, I don't know what else we can do" (T.94). He did not recall that the sentencing judge made any inquiry as to whether the guilty plea had been given voluntarily or as to the circumstances of or reasons for the entry of that plea (T.96). There was no affirmative testimony or

other evidence in the record that any such inquiry was made either at the time of Burchett's entry of the pleas or at his sentencing.

The Response has further misconstrued the testimony of the state court judges involved. The judge who accepted the guilty pleas did not recall anything specific as to Burchett's particular case at all as to whether he made any inquiry concerning whether the guilty pleas were voluntarily entered (T.241-43). His testimony concerning his general practice in inquiring as to voluntariness was, therefore, insufficient to establish that any inquiry was made in Burchett's case. The state court record itself was completely silent as to whether any such inquiry was made. The sentencing judge could only recall asking Burchett whether he had anything to say or any legal cause

why he should not pass sentence (T.250). He also could not remember whether he made any inquiry of Burchett as to whether any prior guilty pleas were voluntarily given (T.251-53). The sentencing judge had no recollection at all as to anything outside what the printed record showed as to Burchett's sentencing (T.252-53). That record was also completely silent as to whether any voluntariness inquiry was made.

The police officer who first obtained Burchett's confession admitted that no warnings were given prior to his interrogation (T.211-12). He believed that Burchett's statements were voluntary only because "I knew in my own mind that I didn't promise him, and I didn't threaten him, and I didn't coerce him" (T.212). He was unaware that Burchett had been previously hospitalized for psychiatric

treatment (T.210-11). He apparently made no inquiry as to Burchett's state of mind or whether he was truly capable of giving a voluntary confession even though his "head was hanging down" and he appeared "remorseful" (T.212).

The Deputy County Attorney who thereafter interrogated Burchett further also did not testify to any inquiry concerning Burchett's psychological ability to give a voluntary confession, although he also vividly recalled that he appeared "very remorseful in his conduct, and his actions seemed extremely sorry, to the extent that it engendered in myself some feeling of sorrow on his behalf " (Tr.221). He also admitted that there was a discussion of future hospitalization for him at or shortly after he had again confessed (T.221-22).

All of this undisputed testimony,

together with that summarized in the Petition itself, amply confirms that there was no sufficient record to support the lower courts' conclusions that Burchett's confessions were voluntarily given or that his guilty pleas were thereafter voluntarily entered. They should, therefore, have been set aside.

II. Burchett Was Not Provided The Effective Assistance of Counsel.

Neither the district court's conclusion that "the evidence falls far short of showing a violation of federal standards in the assistance of counsel" (R.190, Appendix to Petition, at 8a) or the court of appeals' affirmance of those findings without elaboration (Appendix to Petition, at 12a) is supported by the actual events that occurred. Those conclusions are also inconsistent with the

applicable standards for the effective assistance of counsel required by this Court and several other circuit courts.

The Response does not dispute that Burchett's trial counsel totally failed to inquire of him concerning the background of his confessions and his mental condition or to have him examined by a psychiatrist to determine his criminal responsibility and his ability to control his behavior or to assist in his defense. Under the facts presented, these failures clearly violated counsel's constitutional responsibility to be zealous and active and to explore potentially exonerating defenses.

The Ninth Circuit itself has previously recognized that the failure of background investigation by counsel can cause his later advice to plead guilty to fail to meet constitutional requirements.

United States v. Norman, 412 F.2d 629 (9th Cir.1969). This Court has also held in McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."

The Response at pages 9-10 agrees that the Ninth Circuit has taken the position that counsel's errors do not violate a defendant's right to a fair trial unless they reduce the trial to a "farce" or a "mockery of justice." Although not elaborated in its opinion, application of this standard was the only possible basis for the court of appeals' decision in the present case. This standard, however, as it exists in the Ninth Circuit and in the other circuits referred to in the Response, simply cannot be reconciled with

the standard required by this Court and the Fifth, Sixth, and District of Columbia Circuits of "counsel reasonably likely to render and rendering reasonably effective assistance." The Fifth Circuit in West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973) has expressly recognized the distinction between the two standards.

The Response's argument that these standards are really the same is not justified by the cases. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), has rejected the "farce and mockery" standard as too subjective and not a meaningful test of the objective requirements there set forth. Violations of those objective standards include defense counsel depriving a criminal defendant of a potential defense by his own ineffectiveness or incompetence, not performing at least as well as a lawyer with

ordinary training in skill and criminal law, not investigating all apparently substantial defenses available to defendant and asserting them in a timely and proper manner as well as advising the client erroneously on a clear point of law if this advice leads to a deprivation of the client's right to a fair trial. Bruce v. United States, 379 F.2d 113 (D.C.Cir. 1967) and Scott v. United States 427 F.2d 609 (D.C. Cir. 1970), have both also held that the "farce and mockery" standard is no longer valid as such and that the appropriate standard for ineffective assistance of counsel is "whether gross incompetence blotted out the essence of a substantial defense " 427 F.2d at 610. This requirement was also met in the present case. The efforts by trial counsel referred to at pages 14-15 of the Response hardly meet the required standard.

Counsel simply did not explore any possible basis for suppressing Burchett's confession or attempt to develop any meaningful psychiatric defense. His advice to plead guilty therefore was not based on an adequate foundation and should not insulate the guilty plea from constitutional challenge.

III. The Circumstances Under which the Supreme Court of Arizona Affirmed Burchett's Convictions Denied his Rights to Due Process and Equal Protection of the Law.

Burchett's Petition contends that the overruling of two of the Arizona Supreme Court's prior decisions in an opinion signed by all five Justices following arguments in which only three Justices participated when that issue was not either briefed or argued denied his

rights to due process and equal protection of the law. Burchett's argument is not that the Arizona court as an original matter could not hear his case either in division or in banc. It is instead that the court's overruling of its prior decisions under the circumstances involved denied his constitutional rights in connection with the appeal.

The authorities cited by the Response do not, as it claims, "reject as without merit arguments similar to petitioner's." This Court's decision in United States v. American Foreign S.S. Corp., 363 U.S.680, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), instead vacated a judgment where a court of appeals panel was improperly constituted. Neither Center School Dist. No. 58 v. Kenton, 345 S.W2d 120 (Mo. 1961), nor Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963), deal with any comparable

issues whatsoever. None of the other decisions concern an appellate court panel's constitutional responsibilities of due process or equal protection before it may overrule prior cases decided by the full court. None of them reach the situation where, as here, justices signed an opinion who had not heard the argument and thereby overruled prior decisions without briefing or oral argument of that issue. This is the precise set of circumstances in which Burchett's rights were violated.

Conclusion.

For all the foregoing reasons, therefore, in addition to those stated in Burchett's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

By Paul G. Ulrich
Counsel for Petitioner

July, 1974